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Supreme Court, U.S.
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No. 03-47

In the Supreme Court of the United States

FRANK D. GILLIS, ET AL.,
Petitioners

v.

JOHN HOLLAWELL, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the internal policies and practices of a parole agency, which do not bind that agency and may be changed or disregarded whenever it wishes, are "laws" which may not be altered without triggering the protections of the Ex Post Facto Clause?

2. Whether a change to the "aspirational introductory provision" of a parole statute, which leaves the parole board, as before, with virtually unreviewable discretion to grant or deny parole, violates the Ex Post Facto Clause by increasing the punishment for previously committed offenses?

PARTIES TO THE PROCEEDING

This petition seeks review of two judgments, involving identical or closely related questions, on a writ of certiorari to the same court. *See* Sup. Ct. R. 12.4. The two judgments were entered, respectively, in *Hollawell v. Gillis, et al.*, No. 01-1063 (3d Cir.), and in *Mickens-Thomas v. Vaughn, et al.*, No. 02-2047 (3d Cir.).

In the *Hollawell* case, the petitioners are Frank D. Gillis, the Superintendent of the State Correctional Institution at Coal Township, Pennsylvania; and Benjamin A. Martinez, the Acting Chairman of the Pennsylvania Board of Probation and Parole.[1] The respondent is John Hollawell.

In the *Mickens-Thomas* case, the petitioner is the Pennsylvania Board of Probation and Parole. The respondent is Louis Mickens-Thomas.

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[1]Mr. Martinez has been substituted for William Ward, his predecessor in office, pursuant to Sup. Ct. R. 35.3.

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OPINIONS BELOW

The decisions in *Hollawell v. Gillis* are not reported. The decision of the Court of Appeals is reprinted in the appendix to this petition ("Pet. App.") at 1a; and the decision of the District Court is reprinted at Pet. App. 17a.

The decision of the Court of Appeals in *Mickens-Thomas v. Vaughn* is reported at 321 F.3d 374 and is reprinted at Pet. App. 23a. The decision of the District Court is reported at 217 F.Supp.2d 570 and is reprinted at Pet. App. 61a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals in *Hollawell v. Gillis* was entered on April 23, 2003, Pet. App. 2a, and this petition is being filed within 90 days thereafter.

The judgment in *Mickens-Thomas v. Vaughn* was entered on February 21, 2003. Pet. App. 24a. A petition for rehearing was timely filed, and was denied on March 24, 2003. Pet. App. 82a. This petition is being filed within 90 days thereafter.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 10, clause 1 of the United States Constitution provides in relevant part that "[n]o State shall ... pass any *ex post facto* law...."

2. Section 331.1 of the Pennsylvania Probation and Parole Act, as amended in 1996, provides as follows:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Pa. Stat. Ann., tit. 61, § 331.1 (Purdon 1999), *as amended by* Act of December 18, 1996, P.L. 1098, No. 164, § 1.

3. Before its amendment in 1996, Section 331.1 provided as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Act of August 6, 1941, P.L. 861, § 1, *previously codified at* Pa. Stat. Ann., tit. 61, § 331.1 (Purdon).

STATEMENT OF THE CASE

These cases are habeas corpus actions brought by state prisoners challenging the denial of parole, and arise out of a 1996 amendment to Pennsylvania's parole statute. In upholding their challenge, the Court of Appeals, unlike other courts which have considered similar issues, first held that the internal policies of Pennsylvania's Parole Board are "laws" which cannot be changed without implicating the Ex Post Facto Clause. The Court of Appeals then held that the amendment to the parole statute had worked such a change, giving no weight to decisions of the Pennsylvania courts, including the highest court of the Commonwealth, which rejected similar claims and held that the amendment introduced "nothing new" to the parole process.

1. a. Parole in Pennsylvania is governed by the Probation and Parole Act, Pa. Stat. Ann., tit. 61, §§ 331.1 through 331.34a (Purdon 1999) ("Parole Act"). Enacted in 1941, the Parole Act establishes the Board of Probation and Parole, which among other things has the "exclusive power to parole and reparole" all persons sentenced to two years or more of imprisonment. *Id.*, § 331.17.

Prisoners are not eligible for parole until they have served their minimum sentence. *Id.*, § 331.21(a). In deciding whether to grant a parole, the Board is to inform itself of the prisoner's complete criminal record, conduct while in prison, and "physical, mental and behavior condition and history"; and the Board is to consider "the nature and circumstances of the offense committed," any recommendations of the trial judge and prosecutor, and "the general character and background of the prisoner." *Id.*, § 331.19. In addition, a member or designee of the Board must have "seen and heard" the prisoner "in person" before granting or denying parole. *Id.*, § 331.22.

But within these limits, the Act confers unfettered discretion upon the Board. The Board, "in [its] discretion," may release on parole any prisoner "whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." *Id.*, § 331.21. Thus, "the granting of parole is wholly discretionary" with the Board. *Coady v. Vaughn*, 564 Pa. 604, 608, 770 A.2d 287, 290 (2001); "a prisoner has only a right to apply for parole ... and to have that application considered by the Board." *Rogers v. Bd. of Probation and Parole*, 555 Pa. 285, 288, n.2, 724 A.2d 319, 321 n.2 (1999).

Since the legislature "has conferred upon the Parole Board *sole* discretion" to grant or deny paroles, *Rogers*, 555 Pa. at 291, 724 A.2d at 322 (emphasis added), the grant or denial of parole is not ordinarily subject to judicial review. While the Pennsylvania courts will entertain an action in mandamus to compel the Board to exercise its discretion, *see, e.g., Marshall v. Bd. of Probation and Parole*, 638 A.2d 451 (Pa.Cmwlth. 1994), or to assert a *constitutional* challenge to the denial of parole, *Coady v. Vaughn, supra* (claim of ex post facto violation may be addressed in mandamus action), the decisions of the Board are not otherwise reviewable by the courts. *Rogers v. Bd. of Probation and Parole, supra.*

Nor has the Board adopted administrative regulations governing the grant or denial of parole. Under Pennsylvania law, the promulgation of such regulations is governed by a statutory rulemaking process[2];

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[2]*See* the Commonwealth Documents Law, Pa. Stat. Ann. tit. 45, §§ 1102 *et seq.* (Purdon 1991), and the Regulatory Review Act, Pa. Stat. Ann. tit. 71, §§ 745.1 *et seq.* (Purdon (continued...)

regulations thus adopted, if they are substantive rules, have the force and effect of law and bind the adopting agency, while other agency directives do not. *See, e.g., Lopata v. Pa. Unemployment Compensation Bd. of Review*, 507 Pa. 570, 575-76, 493 A.2d 657 (1985). Pursuant to this process, the Board has adopted regulations on a variety of subjects, but not on the substantive criteria for parole decisions. *See generally* Pa. Code, tit. 37, Pt. II.

The Board has, however, developed internal guidelines to aid its decision-making. The "Parole Decision Making Guidelines" structure the Board's decision-making process, but they neither eliminate nor control the Board's discretion in deciding cases; rather, they were designed to reflect the Board's decision-making practices. The Guidelines attempt to judge the likelihood of a successful parole by assigning numerical values to a number of criteria, thought to be of value in predicting the likelihood of recidivism and the potential for violent behavior. The total score thus produced provides a recommendation for or against parole. *See* Pet. App. 30a. This score, however, does not end the process; it "is intended to guide the decision-maker but not dictate the decision." Pet. App. 86a. The Guidelines allow for the consideration of countervailing factors which, in the judgment of the decision-maker, may outweigh the numerical score; the Guidelines form lists some of the most common such factors,[3] but does not purport to be exhaustive. The final decision on parole remains in the

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[2](...continued)
1990).

[3]For example, a history of participation in institutional programs might outweigh a negative recommendation from the numerical score. Similarly, unfavorable recommendations from the Department of Corrections, sentencing judge or prosecutors might outweigh a positive recommendation.

hands of the Board; as the Board's 1990 "Statement on Policy, Procedure and Philosophy" notes, "the structuring of discretion does not eliminate it; the burden of decision remains with the decision maker to evaluate the merits of each case." Pet. App. 84a, *quoted at* Pet. App. 31a.

The information in the record, although dated, indicates that as of 1989 the Board's ultimate decision departed from the Guidelines recommendation in about 20% of the cases. Pet. App. 31a, 86a-87a. In addition, the Guidelines, which were first developed in 1980, have themselves been modified several times over the years to better reflect the Board's actual decision-making practices. *See* Pet. App. 84a (Board's "Statement on Policy, Procedure and Philosophy").

b. In the aftermath of a 1989 prison riot, the Board began pursuing a deliberate policy of "reduction in prison overcrowding through the parole process," and began granting nearly 80% of parole applications. Pet. App. 33a, 83a-84a.[4] In 1994 and 1995, however, two Pennsylvania prisoners committed murders, including the murder of a New Jersey police officer, while on parole. Pet. App. 32a & n.9; *see State v. Simon*, 161 N.J. 416, 737 A.2d 1 (1999). In the aftermath of these crimes, investigations by Pennsylvania's Inspector General and the Chairman of the State Senate Judiciary Committee recommended that Pennsylvania's corrections philosophy should place more emphasis on public safety, and that existing statutes and policies should be changed accordingly. *See* Pet. App. 32a-33a.

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[4]Similar statistics appear in the Pennsylvania Department of Corrections' *2000 Annual Statistical Report*, p. 45, available at http://www.cor.state.pa.us/info (visited May 22, 2003).

Over the next several years, the Pennsylvania legislature enacted or amended a number of statutes relating to parole, including the Parole Act itself.[5] Most relevant to these cases, in December of 1996, the legislature amended Section 331.1 of the Parole Act, Pa. Stat. Ann., tit. 61 § 331.1 (Purdon 1999). Section 331.1 is, as the Court of Appeals said, a "preface to the comprehensive set of rules governing parole in Pennsylvania." Pet. App. 28a n.5. As amended, Section 331.1 recounts the benefits of the parole system, "including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison." It then provides that in providing these benefits, "the

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[5]These included provisions authorizing parole agents to search parolees and their property, *see* Pa. Stat. Ann., tit. 61, § 331.27a (Purdon 1999), *added by* Act of Nov. 17, 1995, P.L. 1339 (Spec. Sess. No. 1), No. 35; authorizing electronic monitoring of parolees and the establishment of intensive supervision units, *see* Pa. Stat. Ann., tit. 61, § 331.16b(a)(10)-(11), *added by* Act of Nov. 17, 1995, P.L. 1145 (Spec. Sess. No. 1), No. 37; expanding the Board from five members to nine, *see* Pa. Stat. Ann., tit. 61, § 331.2 (Purdon 1999), *amended by* Act of Dec. 18, 1996, P.L. 1098, No. 164; permitting crime victims to petition the Board to deny a parole application, *see* Pa. Stat. Ann., tit. 18, § 11.502 (Purdon 2000), *added by* Act of Nov. 24, 1998, P.L. 882, No. 111; requiring, as a condition of eligibility for parole, that prisoners convicted of crimes of violence participate in a crime impact education program, *see* Pa. Stat. Ann., tit. 61, § 331.21(b.1) (Purdon 1999), *added by* Act of Dec. 21, 1998, P.L. 1077, No. 143; and permitting the immediate detention of parolees charged with offenses, *see* Pa. Stat. Ann., tit. 61, §§ 331.21(a) and 331.21a(a.1), *amended by* Act of Dec. 21, 1998, P.L. 1077, No. 143.

[B]oard shall first and foremost seek to protect the safety of the public."[6]

This amendment, to what the Court of Appeals called the "aspirational introductory" provision to the Parole Act, Pet. App. 27a, did not alter the conditions of eligibility for parole, *see id.*, § 331.21, nor did it alter the matters which the Board was required to consider in deciding parole applications, *see id.*, § 331.19, nor did it alter the Board's authority to grant parole "in [its] discretion." *Id.*, § 331.21. Nevertheless, the amendment to Section 331.1, and in particular the exhortation to the Board to consider the public safety "first and foremost," is the only statutory change alleged to have affected the parole decisions challenged in these cases.

In the meantime, the Board had likewise acted. By February of 1996, the Chairman of the Judiciary Committee reported that the Board had "set out to establish public safety as a priority including a more careful review of parole eligible cases...." *See* Pet. App. 33a. Although the Board did not change its Guidelines at this time, the rate at which the Board granted paroles dropped dramatically, from 77% in the years immediately after the 1989 prison riot, to 38% in the fiscal year ending in June of 1996. Pet. App. 83a-84a (Board's Biennial Reports); *see* Pet. App. 33a.[7]

These events occurred well before Section 331.1 was amended in December of 1996. After the statute was

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[6]The complete text of Section 331.1, before and after its amendment, is reprinted above at 1-2.

[7]*See also* PA. DEPT. OF CORRECTIONS, *2000 Annual Statistical Report*, p. 45, available at http://www.cor.state.pa.us/info (visited May 22, 2003).

amended, the rate at which the Board granted paroles actually rose slightly, to 42% in the calendar year ending in June of 1997.[8] Pet. App. 84a. (Board's 1995-97 Biennial Report). At some point between 1998 and 2000, the Board also revised its Guidelines to bring them into line with its actual practices. *See* Pet. App. 44a, 53a n.16, 84a (Board's Statement on Policy, Philosophy and Procedure)(policy should reflect decision-making practice).

Against this background are the two cases presented in this petition.

2. *Mickens-Thomas v. Vaughn.* a. In 1964, Louis Mickens-Thomas raped and strangled twelve-year old Edith Connor. Pet. App. 26a, 61a-62a. He was convicted of first-degree murder and sentenced to life without the possibility of parole. *See* Pet. App. 26a, 62a; *Comm. v. Thomas*, 448 Pa. 42, 292 A.2d 352 (1972). In 1995, on the recommendation of the Commonwealth's Board of Pardons,[9] the Governor of Pennsylvania commuted Mickens-Thomas' sentence to a minimum term of about 32 years, making him eligible for parole in July of 1996. Pet. App. 64a-65a.

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[8]That rate has continued to rise. *See* PA. DEPT. OF CORRECTIONS, *2000 Annual Statistical Report, supra* at p. 45 (parole grants rose from 38.8% in calendar year 1996, to 49.8% in 2000).

[9]The Board of Pardons is an agency separate from the Board of Probation and Parole. *See* Pet. App. 63a n.1, *quoting* PA. CONST., art. 4, § 9.

A panel of the Board considered Mickens-Thomas' parole application in August of 1997.[10] The Board denied his application, citing the brutal nature of his crime, his prior history of assault, the unfavorable recommendation of the District Attorney, and his "very high potential" for assaultive behavior. At his next review, in March of 1998, a second panel denied his application for much the same reasons, citing in addition his need for counseling and treatment.[11] On both occasions, the Board of Pardons concurred with the Parole Board's decision.[12] Pet. App. 34a-37a, 66a-68a. While Mickens-Thomas' habeas petition was pending in the District Court, the Board denied his parole application a third time, in March of 2000. Pet. App. 68a.

b. After exhausting his state court remedies, Pet. App. 25a n.1, Mickens-Thomas brought this habeas action pursuant to 28 U.S.C. § 2254(a). He claimed that "the retroactive application of changes in rules, guidelines,

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[10]Initially, the Board declined to consider Mickens-Thomas' application on its merits, on the ground that he had not spent the requisite time in a pre-release center, as required by Section 331.34a of the Parole Act. The Board later conceded, however, that this provision, which was not included in the Act until 1995, could not constitutionally be applied to Mickens-Thomas. Pet. App. 65a-67a; *see Mickens-Thomas v. Bd. of Probation and Parole*, 699 A.2d 792 (Pa.Cmwlth. 1997).

[11]Mickens-Thomas has consistently refused to accept responsibility for his crime. His only participation in sex offender therapy has been in a limited program for "deniers" like himself. Pet. App. 26a, 36a.

[12]Under the law in effect at the time Mickens-Thomas committed his offense, the Board of Pardons may overrule the Parole Board's decision and order his immediate parole. *See* Pa. Stat. Ann., tit. 61, § 331.21, historical note (Purdon 1999).

policies or statutes" to deny his parole violated the Ex Post Facto Clause.[13] Pet. App. 71a-72a.

The District Court agreed. The District Court looked first to the December 1996 amendment to Section 331.1 of the Parole Act, particularly the provision that the Board "shall first and foremost seek to protect the safety of the public." Pet. App. 74a. The District Court then looked to a variety of other materials — the Board's statement, drawn from its 1995-1997 biennial report, that the Board "is committed to protecting the safety of the public," Pet. App. 74a; evidence that, before 1995, the Board had historically paroled other life prisoners whose sentence had been commuted, Pet. App. 69a, 77a; and statistical evidence showing that parole releases had dropped dramatically between 1991 and the first quarter of 1996. Pet. App. 73a-74a. From this, the District Court concluded that "[i]t seems clear that the Board has adopted the policy change made in the [December] 1996 amendment."

The District Court thus reasoned that the "practical application," Pet. App. 76a, of the December 1996 amendment had "increased to a significant degree the likelihood that petitioner will be in jail longer than if the pre-1996 policy would have been followed." Pet. App. 77a. The District Court ordered the Board to re-hear Mickens-Thomas' parole application "under the standards that existed prior to the amendment to [of] the Probation and Parole Act." Pet. App. 80a. The District Court did not discuss what those "standards" were, or how they differed

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[13]He claimed also that he had a "reasonable and objective expectation," Pet. App. 77a, amounting to a liberty interest, in being paroled, and that the Board's refusal to do so deprived him of both procedural and substantive due process. The District Court rejected this claim, Pet. App. 77a-79a, and it is not before the Court in this petition.

from the standards which the Board had applied to Mickens-Thomas' applications.

c. The Board appealed, but the Court of Appeals affirmed the District Court's decision.[14] The Court of Appeals turned first to the law governing parole before the December 1996 amendment to Section 331.1. To ascertain that law, the Court of Appeals looked, not to the "comprehensive set of rules," Pet. App. 28a n.5, contained in the Parole Act, but rather to the Board's internal forms, manuals and reports, especially the Parole Guidelines and materials relating to them.[15] *See* Pet. App. 29a-32a. The Court of Appeals also relied heavily on the Board's historical practice of granting parole to life prisoners whose sentence had been commuted. Pet. App. 44a, 69a.

Based on these materials, the Court of Appeals concluded that "the Board has, by both its past decisions to grant parole for commuted sentences, and by its formal declarations of policy, expounded discernible parameters that govern its discretion." Pet. App. 46a. The Court of Appeals distilled those "parameters" as follows:

> [P]re-1996 policies ... commanded that the Board give weight to various factors in the parole process, such

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[14]Mickens-Thomas cross-appealed from the District Court's denial of his due process claim, but the Court of Appeals affirmed the District Court's decision in this respect as well. Pet. App. 25a, 59a.

[15]The Court of Appeals cited, for example, the Board's 1989 Manual of Operations, Pet. App. 29a; a 1990 paper entitled "Parole Decision Making Guidelines: A Statement on Policy Procedure and Philosophy," Pet. App. 30a; and a 1991 report on the Guidelines prepared for the Pennsylvania House Judiciary Committee. Pet. App. 30a.

> as Department of Corrections staff recommendations, educational accomplishments, job training, and therapy programs. ... [R]elease upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. ... [T]he Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated in its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines.

Pet. App. 44a-45a. While "some discretion might still exist within the[se] parameters," a parole decision which failed to adhere to them "falls outside the realm of the legitimate exercise of discretion." Pet. App. 47a.

Nor, in the Court of Appeals' view, could the Board alter these "parameters" without ex post facto implications. While "new Board members may carry new ideas regarding the exercise of [their] discretion, and old Board members may change their mind in the light of new considerations," they may not apply their "newly-found wisdom" to deny a prisoner's "preexisting right to parole consideration," any more than a legislature could later re-sentence that prisoner more severely. "This is precisely what the Ex Post Facto Clause prohibits." Pet. App. 47a.

The Court of Appeals then examined the Board's decisions on Mickens-Thomas' parole applications in light of the pre-1996 "parameters" it had identified. Pet. App. 34a-39a, 49a-54a. The Board argued that its decisions were legitimate exercises of the discretion conferred by the Parole Act, but the Court of Appeals disagreed. In the Court of Appeals' view, "under the Guidelines [Mickens-

]Thomas was entitled to parole," Pet. App. 48a; and the Board's departure from its Guidelines, based on "the nature of the underlying offense and the potential danger to the public if [Mickens-]Thomas were released," Pet. App. 50a, was not justified. "[T]he Board's denial of [Mickens-]Thomas' parole, despite its claims that the decision was the result of the discretion vested in it by the pre-1996 policies, exceeded any reasonable interpretation of th[ose] policies." Pet. App. 54a.

Rather, the Court of Appeals held that the Board's actions were the product of a "new parole policy of 1996," Pet. App. 40a, which in turn was rooted in the amendment to Section 331.1 of the Parole Act in December of that year. Pet. App. 40a-44a. The Court of Appeals found evidence of this "new policy" in the remarks of legislators, courts, and the Board itself, Pet. App. 43a-44a, 55a; and laid special emphasis on the Board's earlier actions in granting paroles to prisoners whose sentences had been commuted. Pet. App. 44a. Under this "new policy," the Board gave "foremost importance," Pet. App. 41a, to considerations of public safety, as opposed to other factors. Pet. App. 45a. As the Court of Appeals saw it, while "public safety had been a part of the Board's pre-1996 criteria, it had never been an exclusive, or even the most important, criterion." Pet. App. 53a-54a.

The Court of Appeals acknowledged the decision of the Supreme Court of Pennsylvania in *Winklespecht v. Pa. Bd. of Probation and Parole*, 571 Pa. 685, 813 A.2d 688 (2002), but accorded it no weight. *See* Pet. App. 54a-55a. In *Winklespecht*, the state Supreme Court had considered and rejected an ex post facto challenge, based on the amendment to Section 331.1 of the Parole Act, to the denial of parole. The Pennsylvania Supreme Court said:

> Although the language concerning "protect[ing] the safety of the public" and "assist[ing] in the fair administration of justice" was added to § 331.1 in 1996, these concepts are nothing new to the parole process and have always been underlying concerns. Both versions of § 331.1 leave the decision regarding the grant of parole within the discretion of the Board; the fact that some language was added in 1996, which clarified the policy underlying the parole process, does nothing that increases Winklespecht's punishment.

Winklespecht, 813 A.2d at 692 (plurality opinion). *Accord id.* at 693 (Castille, J., concurring); *id.* at 695-97 (Saylor, J., concurring and dissenting). The Court of Appeals, however, dismissed *Winklespecht* as of no significance because it "came too late to alter the Board's view of the statutory amendment on the outcome of this case." In the Court of Appeals' view, the Board — which had successfully argued for the interpretation of the statute adopted by the state Supreme Court in *Winklespecht* — was "uninfluenced" by that interpretation. *Ibid.*

Accordingly, the Court of Appeals held that the denial of Mickens-Thomas parole, on the basis of the "new policy of 1996," violated the Ex Post Facto Clause, and remanded for the Board to issue a new decision on his application within 45 days. In making this decision, the Board was to adhere to its pre-1996 policies, as described by the Court of Appeals:

> If the Guidelines recommend release, the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless

countervailing negative factors affirmatively outweigh reasons supporting release.

Pet. App. 59a.

The Court of Appeals denied rehearing and rehearing en banc, and likewise denied a motion to stay its mandate pending the filing of this petition. On May 23, 2003, the Board, pursuant to the mandate, issued its new decision on Mickens-Thomas' application, and again denied it. On June 4, 2003, Mickens-Thomas filed motions in the Court of Appeals, claiming that the Board's decision was not consistent with the Court of Appeals' judgment and asking for his immediate release from custody; those motions are pending as of the filing of this petition.

3. *Hollawell v. Gillis.* a. John Hollawell is serving a sentence of six and a half to twenty-three years for corrupt organization offenses, bribery and conspiracy. Pet. App. 3a. The Board denied his application for parole in July of 1999, on the ground that "the mandates to protect the public and to assist in the fair administration of justice cannot be achieved through your release on parole." Pet. App. 18a. After pursuing his state court remedies, he filed this habeas action in the District Court, claiming that the Board's action violated the Ex Post Facto Clause. Like Mickens-Thomas, Hollawell based his claim on the amendment to Section 331.1 of the Parole Act.

b. The District Court disagreed. The District Court recognized that the text of Section 331.1 had changed, Pet. App. 19a; but held that, considered within the context of "all of the statutory procedures relating to parole," *ibid*, this change in the statutory text had not worked a change in substance. The District Court relied for this holding on Section 21 of the Parole Act, which at

all relevant times has empowered the Board to parole convicts "whenever in its opinion ... it does not appear that the interests of the Commonwealth will be injured thereby." Pa. Stat. Ann., tit. 61, § 331.21, *quoted at* Pet. App. 21a. Thus, in the District Court's view,

> [a]lthough the old version of ... § 331.1 did not contain a directive that the Parole Board protect the public, protection of the public was always a factor the Parole Board was obliged to consider. ... Both before and after the 1996 amendment to § 331.1, the Parole Board was charged with protecting the public. The law in this respect did not change.

Pet. App. 20a-21a. The District Court accordingly denied Hollawell's petition.

c. The Court of Appeals reversed, relying entirely on its intervening decision in *Mickens-Thomas*.[16] *See* Pet. App. 12a. The factual record in *Hollawell* was far less extensive than that on which the *Mickens-Thomas* panel had relied. The *Mickens-Thomas* panel had before it the Board's entire file on Mickens-Thomas, Pet. App. 70a-71a, and the panel had relied heavily on its extensive review of the Board's decisions, worksheets and internal notes on his applications. *See* Pet. App. 34a-39a, 49a-54a. No such materials were available to the *Hollawell* panel. The *Mickens-Thomas* panel had likewise relied heavily on what it called the "staggering," Pet. App. 44a, *quoted at* Pet. App. 15a, statistical evidence on earlier grants of paroles to those with commuted life sentences.

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[16]By the time the Court of Appeals issued its decision in *Hollawell* on April 23, it had not only decided *Mickens-Thomas* (on February 21) but had also denied the petitioners' request for rehearing or rehearing en banc (on March 24).

These statistics had no bearing on Hollawell, who is not a commuted life prisoner.

Nevertheless, the Court of Appeals held that no further factual development was needed in light of the *Mickens-Thomas* decision, Pet. App. 15a-16a, which it read as broadly applicable: "*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statute violates the *Ex Post Facto* Clause." Pet. App. 16a. The panel recognized that in *Winklespecht* the state Supreme Court had recently come to the opposite conclusion on the same issue. Pet. App. 15a ("We are aware of the recent decision of the Pennsylvania Supreme Court considering whether the statutory amendment violates the *Ex Post Facto* Clause....") The panel made no comment on *Winklespecht*, however, except to observe that it was bound by the decision in *Mickens-Thomas*.

REASONS FOR GRANTING THE WRIT

The Court of Appeals committed two distinct, although related, errors in these cases. First, it held that the "law" governing parole in Pennsylvania is embodied in the internal guidelines and practices of the Board, which cannot be changed without ex post facto implications. Building upon this first error, the Court of Appeals then erroneously concluded that the amendment to Section 331.1 had worked just such a change. Both of these holdings should be reviewed by the Court. The first conflicts with virtually all federal and state courts which have considered similar issues; while the second is at odds with the highest court of Pennsylvania on an issue which directly affects the administration of the Commonwealth's parole system.

I. The Court of Appeals' Holding, That the Board's Internal Policies Are "Laws" for Ex Post Facto Purposes, Conflicts with the Decisions of Most of the Courts Which Have Considered Similar Issues.

The internal policies of parole agencies come in a wide variety of forms: administrative regulations, guidelines, operating manuals, directives, memoranda, and so on. The proper analysis of these policies under the Ex Post Facto Clause, and in particular whether such policies are "laws" within the meaning of the Clause, presents an important and recurring issue which the Court has not addressed. The Courts of Appeals and state courts, however, have frequently confronted it, and have reached a fair degree of consensus. Most of these courts have concluded that policies which embody mandatory rules binding the parole agency — often because they have been formally adopted, through some prescribed procedure, as regulations — are "laws" which trigger the protections of the Ex Post Facto Clause when they are altered. *See, e.g., Akins v. Snow*, 922 F.2d 1558, 1561 (11th Cir. 1991) (Georgia regulations adopted pursuant to grant of quasi-legislative power are "laws" for ex post facto purposes), *overruled on other grounds, Garner v. Jones*, 529 U.S. 244 (2000).[17] Policies, however, which do *not* place binding constraints on a parole agency's discretion —policies which merely structure the exercise of agency discretion, or indicate how the agency intends to exercise its discretion — are not "laws" within the meaning of the Ex Post Facto Clause.

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[17]In *Garner*, the Court held that the Georgia regulations considered in *Akins* did not necessarily violate the Ex Post Facto Clause, because they did not necessarily create a "significant risk of increased punishment." 529 U.S. at 257.

Thus, the Courts of Appeals are unanimous in holding that the guidelines used by the United States Parole Commission are not "laws" for ex post facto purposes. *See, e.g., Prater v. U.S. Parole Comm'n*, 802 F.2d 948, 951 (7th Cir. 1986) (en banc) (collecting cases); *DiNapoli v. Northeast Regional Parole Comm'n*, 764 F.2d 143, 146-47(2d Cir. 1985) (collecting cases). The Parole Commission's guidelines, like the Pennsylvania Board's guidelines in this case, score prisoners along a series of variables designed to measure the severity of their crime and the risk of parole violation; the resulting score then produces a recommended disposition. Pet. App. 30a-31a; *see Warren v. U.S. Parole Comm'n*, 659 F.2d 183, 192-93 (D.C. Cir. 1981). The Parole Commission, however, like the Pennsylvania Board, remains free to depart from the guidelines when circumstances warrant, and it is this factor which the Courts of Appeals have found dispositive.[18] *Id.*, at 193. The Sixth Circuit explained:

> These guidelines are not law, but guideposts which assist the Parole Commission ... in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not fixed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines.

Ruip v. United States, 555 F.2d 1331, 1335 (6th Cir. 1977), *quoted in DiNapoli*, 764 F.2d at 146. *Accord Prater v. U.S. Parole Comm'n*, 802 F.2d at 954 (guidelines are

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[18]Only the Third Circuit initially resisted this analysis, *see U.S. ex rel. Forman v. McCall*, 709 F.2d 852 (3d Cir. 1983), but eventually even the Third Circuit conceded that the guidelines were administered so flexibly that they were not "laws" for ex post facto purposes. *See U.S. ex rel. Forman v. McCall*, 776 F.2d 1156, 1163 (3d Cir. 1985) (Commission decisions accorded with guidelines in only 75.4% of cases).

interpretive rather than legislative rules). Or, as the District of Columbia Circuit explained in *Warren*:

> The punishment prescribed for Warren was to be held after his minimum term at the mercy of parole authorities exercising their discretion as best they could. The mere fact that the Parole Commission's mercy is now channeled, structured and rationalized by a formal system of guidelines does not worsen Warren's position. He was sentenced to be held at their discretion. He is being held at their discretion.

Id., at 196. *Accord Portley v. Grossman*, 444 U.S. 1311 (1980) (Rehnquist, J., in chambers) (no ex post facto violation from a "change in guidelines assisting the Commission in the exercise of its discretion"). *Cf. Miller v. Florida*, 482 U.S. 423, 435 (1987) (distinguishing Florida's sentencing guidelines on the ground that, unlike the federal parole guidelines, they bind sentencing courts); *U.S. v. Seacott*, 15 F.3d 1380 (7th Cir. 1994) (federal sentencing guidelines are "laws" because, unlike the parole guidelines, they tightly control the discretion of the courts).

The courts have applied the same analysis, with the same results, to state parole policies. Thus, in *Griggs v. Maryland*, 263 F.3d 355 (4th Cir. 2001), the court rejected an ex post facto challenge to an announcement by the Governor that he would not approve parole to prisoners serving a life sentence unless they were very old or terminally ill. The Fourth Circuit relied in turn on *Lomax v. Warden, Maryland Correctional Training Center*, 356 Md. 569, 741 A.2d 476 (1999), which had rejected an identical challenge. The *Lomax* court recognized that a "law," for ex post facto purposes, may include some administrative regulations. *Id.*, at 577. Nevertheless, the ex post facto prohibition is "inapplicable to parole guidelines which do not have the force and effect of law

but are merely policies ... that show how ... discretion is likely to be exercised." *Ibid* (internal quotation marks omitted). In this case, the challenged policy was "simply an announcement of guidelines as to how the Governor would exercise the discretion which he has under the law. The Governor's announcement did not bind him, and he can employ different guidelines whenever he desires to do so." *Ibid.*

Still other courts have said the same. "The Ex Post Facto Clause does not apply to guidelines that do not create mandatory rules for release but are promulgated simply to guide the parole board in the exercise of its discretion. ... Such guidelines are not 'laws' within the meaning of the Ex Post Facto Clause." *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001) (policy of denying parole to prisoners convicted of crimes of violence did not implicate ex post facto protections). *Accord Shabazz v. Gabry*, 123 F.3d 909, 915 & n.12 (6th Cir. 1997) (properly promulgated Michigan administrative regulation was "law" for ex post facto purposes, but internal memoranda and policy directives were not); *Blair-Bey v. Quick*, 151 F.3d 1036 (D.C. Cir. 1998) (guidelines which merely codified agency practice, and which agency was free to ignore, not "laws"). *Cf. Flemming v. Oregon Bd. of Parole*, 998 F.2d 721 (9th Cir. 1993) (Oregon regulations, which under state law had the force and effect of law, are "laws"); *Gwong v. Singletary*, 683 So.2d 109 (Fla. 1996) (same, Florida regulations); *Stansbury v. Hannigan*, 265 Kan. 404, 960 P.2d 227 (1998) (same, Kansas regulations).

In these cases, by contrast, the Third Circuit paid no attention to whether the Board's Guidelines have any mandatory or binding character under Pennsylvania

law[19]; indeed, the Third Circuit offered no support at all for its assertion that the Guidelines "govern [the Board's] discretion." Pet. App. 46a. *Cf., e.g., Miller v. Florida*, 482 U.S. at 435 (looking to Florida law to establish binding character of state sentencing guidelines). In addition, the Third Circuit, unlike other courts, brushed aside evidence that the guidelines do not, on their face, purport to supplant the exercise of Board discretion[20]; and, unlike other courts, brushed aside evidence that, in practice, the Board departs from its guidelines in a substantial percentage of cases. *See* Pet. App. 31a (about 20% of cases decided contrary to Guidelines).

The Third Circuit's decisions in these cases thus cannot be reconciled with the body of law just described. The Court should therefore review these cases to resolve this conflict.

II. The Court of Appeals' Decision Conflicts with Decisions of the Supreme Court of Pennsylvania, on a Matter Directly Affecting the Administration of Pennsylvania's Parole System.

The Court of Appeals' decision likewise brings it into conflict, on several levels, with the highest court of Pennsylvania. First, the Court of Appeals' assertion — which it made no effort to support — that the Board's Guidelines constitute binding rules which "govern its discretion," Pet. App. 46a, conflicts with well-settled principles of Pennsylvania administrative law.

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[19]As we suggested above, *supra* at 4-6, and discuss in more detail below, they do not.

[20]"[T]he structuring of discretion does not eliminate it; the burden of decision remains with the decision maker to evaluate the merits of each case." Pet. App. 31a, *quoting* Board's "Statement on Policy, Procedure and Philosophy."

As we explained above, *supra* at 4, Pennsylvania administrative regulations which are adopted in accordance with the statutory notice-and-comment process have the force of law and create controlling standards of conduct which bind the adopting agency. *E.g., Borough of Pottstown v. Pennsylvania Municipal Retirement Bd.*, 551 Pa. 605, 609-10, 712 A.2d 741, 743 (1998); *see Sourbeer v. Robinson*, 791 F.2d 1094, 1097 n.1, 1100-01 & n.4. (3d Cir. 1986). Thus, for example, the Board's regulations at Pa.Code, tit. 37, § 75.3 (presumptive backtime ranges for parole violators) govern the Board's own decision-making. *See, e.g., Corley v. Bd. of Probation and Parole*, 478 A.2d 146, 148 (Pa.Cmwlth. 1984) (Board must justify departure from presumptive backtime range).

Agency directives which are not adopted through this process, however, lack legal force. They are either invalid regulations which should have been promulgated in accordance with the statutory process, *see, e.g., Lopata v. Pa. Unemployment Compensation Review Bd.*, 507 Pa. at 575-76; or, like the Board's Guidelines, they are mere statements of agency policy which need not be so adopted. *See, e.g., Pa. Human Relations Comm'n v. Norristown Area Sch. Dist.*, 473 Pa. 334, 346-51, 374 A.2d 671, 677-80 (1977). Such statements "do[] not establish a binding norm upon that agency," but simply "announce the agency's provisional intentions for the future." *Eighty-Four Mining Co. v. Three Rivers Rehabilitation, Inc.*, 554 Pa. 443, 453, 721 A.2d 1061, 1066 (1999). The Court of Appeals' claim that the Board's Guidelines "govern its discretion," cannot be squared with these principles.

Second, the Court of Appeals' resulting vision of Pennsylvania's parole system, in which the Board's discretion is narrowly cabined within the "parameters" identified by the Court of Appeals, *see, e.g.*, Pet. App. 47a

("some discretion *might* still exist within the[se] parameters," emphasis added), is completely at odds with the scheme of unfettered discretion established by the Parole Act and confirmed in decision after decision by the Pennsylvania Supreme Court. *See, e.g., Coady v. Vaughn*, 564 Pa. at 608, 770 A.2d at 290; *Rogers v. Bd. of Probation and Parole*, 555 Pa. at 288 n.2, 724 A.2d at 321 n.2; *Commonwealth ex. rel. Sparks v. Russell*, 403 Pa. 320, 169 A.2d 884 (1961).

Finally, and most acutely, the Court of Appeals' decision in these cases conflicts with the Pennsylvania Supreme Court's decision in *Winklespecht v. Bd. of Probation and Parole, supra*, as well as with the Pennsylvania Commonwealth Court's earlier decision in *Reynolds v. Bd. of Probation and Parole*, 809 A.2d 426 (Pa.Cmwlth. 2002). Simply put, in *Winklespect* and *Reynolds* the Pennsylvania courts held that the amendment to Section 331.1 does not violate the Ex Post Facto Clause, and in *Mickens-Thomas* and *Hollawell* the Court of Appeals held that it does. Pet. App. 15a-16a.

Thus, the Court of Appeals sees a Board hedged about with "parameters" which were suddenly altered, while the Pennsylvania courts see a Board exercising unfettered discretion both before and after the amendment to Section 331.1. *Winklespecht*, 813 A.2d at 692 ("Both versions of § 331.1 leave the grant of parole within the discretion of the Board"). The courts of Pennsylvania see a parole system in which protecting the safety of the public is and always has been "an underlying concern," *Winklespecht*, 813 A.2d at 692 (plurality opinion), while the Court of Appeals envisions a parole regime in which "concern for potential risks to public safety could not be the sole or dominant basis for parole denial," Pet. App.

45a — a regime which not only conflicts with *Winklespecht* but is downright bizarre.[21]

These holdings are not compatible, and their incompatibility flows directly from the Court of Appeals' disregard for Pennsylvania law discussed above. It is obviously unsatisfactory to have the Court of Appeals at loggerheads with Pennsylvania's highest court on an issue which is not only thoroughly entwined with issues of state law, but which also directly affects the administration of the Commonwealth's criminal justice system. Pennsylvania must therefore ask the Court to resolve this impasse.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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[21] *See Prater v. U.S. Parole Comm'n*, 802 F.2d at 950 (dismissing the "weird possibility" that a "responsible parole commission could take the position that while releasing the prisoner would be incompatible with the welfare of society, he should be released anyway").

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June 18, 2003

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3996

JOHN HOLLAWELL,
Appellant,

v.

FRANK D. GILLIS, Superintendent SCI Coal Township, WILLIAM WARD, ALLEN CASTOR, DAHLE BINGAMAN, SEAN RYAN, NICHOLAS MULLER, GARY LUCHT, MICHAEL WEBSTER, JOHN ENGLE, DAVID WITHERS, JOHN DOE(S), PBPP MEMBERS/EMPLOYEES, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA BOARD OF PROBATION AND PAROLE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 4:CV-99-1502)
District Judge: The Honorable Malcolm Muir

No. 01-1063

JOHN HOLLAWELL,
Appellant

v.

FRANK GILLIS, Superintendent, WILLIAM WARD, Pennsylvania Board of Probation and Parole Chairman

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 4:CV-00-1222)
District Judge: The Honorable Malcolm Muir

ARGUED JANUARY 23, 2003

BEFORE NYGAARD, AMBRO AND LOURIE,* Circuit Judges

(Filed: April 23, 2003)

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*Honorable Alan D. Lourie, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION OF THE COURT

LOURIE, Circuit Judge.

John Hollawell appeals from the decision of the United States District Court for the Middle District of Pennsylvania denying his petition for a writ of habeas corpus. *Hollawell v. Gillis*, No. 4:CV-99-1502, slip op. at 5 (M.D.Pa. Nov. 30, 1999) (*"Hollawell I"*). Because the petition was untimely, we vacate the District Court's order and remand with instructions for the District Court to dismiss the petition. Mr. Hollawell also appeals from a second decision of the same court denying a separate petition for a writ of habeas corpus. *Hollawell v. Gillis*, No. 4:CV-00-1222, slip op. at 5 (M.D.Pa. Dec. 21, 2000) (*"Hollawell II"*). Because that decision was in error, we vacate that decision as well.

BACKGROUND

Hollawell was convicted by a Pennsylvania court for corrupt organizations offenses, bribery, and conspiracy. He was sentenced to serve between six and a half and twenty-three years in a Pennsylvania correctional facility, and he began doing so in 1990. Since his minimum term elapsed, he has been denied parole several times by the Pennsylvania Board of Probation and Parole. He has brought numerous challenges to the Board's actions. Two of those challenges are the bases for the present appeals.

First, Hollawell has alleged that the Parole Board denied him parole on the grounds of his race (white) and

comments he made criticizing the Board. More specifically, he has alleged that specific members of the Board made statements to the effect that his race, background, and criticisms of the Board were the reasons that he had not been paroled. Hollawell challenged his denial of parole on those grounds by filing a petition for mandamus in the Commonwealth Court, which rejected his petition in September 1995, *Hollawell v. Pa. Bd. of Prob. & Parole,* No. 3267 C.D.1995 (Pa.Commw.Ct. Sept. 25, 1995), and by appealing that rejection to the Pennsylvania Supreme Court, which denied his appeal in June 1996, *Pa. Bd. of Prob. & Parole v. Hollawell,* Nos. 572, 573 (Pa. June 14, 1996). Thereafter, Hollawell filed a petition for a writ of habeas corpus in the District Court in August 1999. The court denied his petition, finding that his allegations of discrimination and retaliation by the Parole Board were unsupported and that he was denied parole because of "poor institutional adjustment, concern for public safety and unfavorable recommendations from various sources, including the sentencing judge." *Hollawell I* at 3-4.

Second, Hollawell has challenged the denials of parole as being violative of the *Ex Post Facto* Clause of the United States Constitution due to a 1996 amendment to 61 Pa. Cons. Stat. § 331.1, the statute governing parole standards. At the time of his conviction, that statute read as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient

> parole administration, and to that end it is the intent of this Act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

61 Pa. Cons. Stat. § 333.1 (pre-1996). In 1996, the statute was amended, giving "first and foremost" emphasis to "the safety of the public" and no longer mentioning rehabilitation of the offender:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the Board shall first and foremost seek to protect the safety of the public. In addition to this goal, the Board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control, and treatment of paroled offenders.

61 Pa. Cons. Stat. § 333.1 (post-1996).

On July 21, 1999, when Hollawell was denied parole, the Parole Board's rationale tracked the language of the amended statute: "[T]he mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." On December 2, 1999, Hollawell challenged that denial by filing a petition for a writ of mandamus in the Commonwealth Court, arguing that the change in the statute retroactively increased his punishment in violation of the *Ex Post Facto* Clause. The Commonwealth Court dismissed the petition for lack of jurisdiction.

Hollawell v. Pa. Bd. of Prob. & Parole, No. 688 M.D.1999 (Pa.Commw.Ct. Dec. 13, 1999). Although Hollawell did not appeal that decision to the Pennsylvania Supreme Court, he did file a subsequent petition for a writ of mandamus, invoking the Pennsylvania Supreme Court's original jurisdiction and seeking the same relief on the *Ex Post Facto* ground. The Pennsylvania Supreme Court denied the petition without explanation. *Hollawell v. Ward*, No. 291 M.D. Misc. Docket entry.1999 (Pa. Mar. 27, 2000).[1]

Hollawell next filed a petition for a writ of habeas corpus in the District Court in July 2000. The court adopted *sub silentio* a magistrate's report and recommendation that Hollawell had exhausted his state court remedies before seeking federal habeas corpus relief. The magistrate found that any appeal by Hollawell of the decision by the Commonwealth Court would have been fruitless because state law apparently did not permit mandamus relief at that time. *Hollawell v. Gillis*, No. 4:CV-00-1222, slip op. at 12 (Nov. 2, 2000) (Magistrate's Report & Recommendation); *see also id.* at 10 n. 1 (noting that *Coady* was pending in the Pennsylvania Supreme Court at that time). On the merits, the court applied the *Morales* test, *viz.*, whether the change to the parole law created "a sufficient risk of increasing the measure of punishment," and determined that the change was not significant. *Hollawell II* at 4

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[1] The Pennsylvania Supreme Court subsequently held that it is within the Commonwealth Court's original jurisdiction to decide mandamus petitions raising questions whether Parole Board decisions violate the *Ex Post Facto* Clause. *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa.2001). Thus, the Commonwealth Court's 1999 dismissal of Hollawell's petition for lack of jurisdiction would have been erroneous had it occurred after *Coady*.

(citing *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 509 (1995)). Looking to a related preexisting parole statute, 61 Pa. Cons. Stat. § 331.21, and more specifically its directive to protect the "interests of the Commonwealth" from "injury," the court found that the law had always directed the Parole Board to protect the public safety. *Id.* at 5-6.

Hollawell separately appealed both decisions of the District Court. We have jurisdiction under 28 U.S.C. § 1291. We heard oral arguments for both appeals together and set forth our decisions for each in this single opinion.

DISCUSSION

A. *Appeal No. 99-3996 (Discrimination and Retaliation)*

In reviewing a district court's decision on a habeas corpus petition, we review the court's legal conclusions *de novo* and any factual findings for clear error. *Ruggiano v. Reish*, 307 F.3d 121, 126 (3d Cir.2002) (citing *Rios v. Wiley*, 201 F.3d 257, 262 (3d Cir.2000)). We also review decisions regarding the timeliness of a habeas corpus petition *de novo*. *Johnson v. Hendricks*, 314 F.3d 159, 161 (3d Cir.2002) (citing *Nara v. Frank*, 264 F.3d 310, 314 (3d Cir.2001)).

Hollawell first argues that he exhausted his state court remedies by filing a mandamus petition challenging the denial of parole on discrimination and retaliation grounds. He specifically points to an adverse decision by the Commonwealth Court in September 1995 and an adverse decision on the appeal of that decision by the Pennsylvania Supreme Court in June 1996. On the merits, he argues that he has presented sufficiently detailed allegations of statements to the effect that the decisions denying parole were the product of

discrimination and retaliation so as to raise factual issues that merit discovery and a hearing.

The Commonwealth responds that Hollawell's discrimination and retaliation-based habeas corpus actions, commenced in 1999, were well past the one-year statute of limitations, which began at the time of the final adverse state court decision in 1996. Alternatively, the Commonwealth contends that Hollawell did not exhaust his state remedies by seeking relief from the state courts within the year preceding his federal action. On the merits, the Commonwealth contends that Hollawell's allegations were insufficient to justify relief, and that the Parole Board's stated reasons for denying him parole were sound and belie his claims of discrimination and retaliation.

We agree with the Commonwealth that Hollawell's habeas corpus action in the District Court was time-barred. The one-year limitations period is set by statute:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;....

28 U.S.C. § 2244(d)(1). Hollawell's brief unequivocally asserts that the relevant state court decisions occurred in 1995 and 1996. That fact was confirmed by Hollawell's

counsel during oral argument.[2] That being the case, Hollawell's 1999 federal habeas corpus petition was filed more than three years after the final state court decision and is therefore clearly time-barred. Accordingly, the District Court erred in not dismissing the petition; we therefore vacate the court's denial of Hollawell's petition in *Hollawell I* and remand for the court to enter a dismissal with prejudice. *See, e.g., Johnson,* 314 F.3d at 163 (affirming a dismissal of a habeas corpus petition as time-barred under § 2244(d)(1)); *Robinson v. Johnson,* 313 F.3d 128, 143 (3d Cir.2002) (same).

B. *Appeal No. 01-1063 (*Ex Post Facto *Violation)*

Because "the determination of whether state remedies have been exhausted and whether exhaustion should be excused involves the application and interpretation of legal precepts," we review issues of exhaustion *de novo. Hankins v. Fulcomer,* 941 F.2d 246, 249 (3d Cir.1991) (citing *Schandelmeier v. Cunningham,* 819 F.2d 52, 54 (3d Cir.1986); *Sullivan v. Cuyler,* 723 F.2d 1077, 1082 (3d Cir.1983)). Because the determination whether a change in law violates the *Ex Post Facto* Clause is a quintessentially legal question, we also review that issue *de novo. See Ruggiano,* 307 F.3d at 126.

1. *Exhaustion of State Remedies*

Hollawell preemptively argues that he properly exhausted the state remedies available to him before

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[2]Hollawell has filed a flurry of state and federal petitions, raising some uncertainty concerning which federal actions relate to which state actions. However, we believe the record and assertions of counsel at oral argument make clear that the federal petition involved in this appeal relates to the state petitions decided in 1995 and 1996.

filing for habeas corpus relief in federal court. He argues that he filed petitions for mandamus in both the Commonwealth Court and the Pennsylvania Supreme Court, but that his petitions were denied under the then-existing (pre-*Coady*) law. The Commonwealth responds that Hollawell was required to appeal the Commonwealth Court's denial to the Pennsylvania Supreme Court, rather than merely file a separate mandamus petition in the Supreme Court.

We agree with Hollawell that the exhaustion requirement poses no obstacle to our rendering a decision on the merits in this case. The exhaustion requirement, codified at 28 U.S.C. § 2254(b), is grounded in comity and affords states a full opportunity to correct constitutional violations before the federal courts consider the issues. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). A habeas petitioner gives the state courts a full opportunity to address his case by attempting to appeal through the chain of appeals to the state's highest court. *Id.* at 845 ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

In this case, Hollawell has apparently technically not complied with the requirement to present his *Ex Post Facto* case through the state court system's chain of appeals. Rather than appeal the Commonwealth Court's decision to the Pennsylvania Supreme Court, he filed a new petition in the Pennsylvania Supreme Court seeking a decision in the first instance. Notwithstanding that failure to appeal, we conclude that Hollawell has satisfied the exhaustion requirement. First, Hollawell filed both state mandamus petitions as a *pro se* litigant, and we are somewhat forgiving of the shortcomings of *pro se* litigants concerning such technical matters as the distinction between appellate review of a lower court's decision and

invoking the original jurisdiction of an appellate court. Second, Hollawell did obtain a decision from the Commonwealth's highest court, and it is quite possible that the Pennsylvania Supreme Court, obviously aware of the lower court's decision, treated his *pro se* petition as being equivalent to an appeal. In any event, it acted upon and denied that petition. Third, the state law at the time arguably did not permit the mandamus relief Hollawell was seeking, thus bringing him within an exception to the exhaustion requirement. *See* 28 U.S.C. § 2254(b)(1)(B). Thus, we consider that the appeal is properly before us.

2. Ex Post Facto *Violation: Merits*

In his original briefs and oral argument, Hollawell has argued that the change in the statute altered the factors to be considered by the Parole Board and thus constituted a more serious statutory change than those previously upheld as nonviolative of the Constitution. According to Hollawell, the old statute gave primary importance to the rehabilitation of the offender, while the amended statute introduced a new condition - "protection of the safety of the public" - and further made that new condition the paramount one. Hollawell contends that the new condition is truly new and not merely a restatement of 61 Pa. Cons. Stat. § 331.21, which directed the Parole Board to protect the "interests of the Commonwealth." Finally, Hollawell contends that parole release rates have decreased significantly since the change in the law, indicating that the change has increased the penalties for criminal violations.

In its original briefs and oral argument, the Commonwealth has responded that parole decisions have always been at the discretion of the Parole Board and that the amendment therefore did not amount to a "law" for *Ex Post Facto* purposes. The Commonwealth also

contends that, even before the amendment, the Parole Board was obliged to consider public safety under the "interests of the Commonwealth" prong of § 331.21. Finally, the Commonwealth disputes the accuracy and significance of Hollawell's empirical data concerning parole rates.

After oral argument in this case, this court issued a decision in *Mickens- Thomas v. Vaughn*, 321 F.3d 374 (3d Cir.2003), holding that the statutory change did constitute an *Ex Post Facto* violation with respect to an individual already sentenced. At our direction, the parties submitted supplemental briefs addressing the impact of *Mickens-Thomas* on this case. Hollawell's supplemental brief contends that *Mickens-Thomas* confronted the identical issue presented in this case, and squarely rejected the same arguments that the Commonwealth now advances. According to Hollawell, he should receive a new parole hearing applying the pre-amendment standards, just as Thomas received. The Commonwealth's supplemental brief makes three contentions. First, *Mickens-Thomas* does not reach the exhaustion issue present in this case. Second, the decision in *Mickens-Thomas* rests upon an extensive factual record that is not present in this case. Third, according to the Commonwealth, *Mickens-Thomas* was incorrectly decided and should be reconsidered.

The Constitution forbids Congress and the states from enacting *Ex Post Facto* laws. U.S. Const. art. I, § 9, cl. 3, § 10, cl. 1. The relevant *Ex Post Facto* Clause reads as follows: "No State shall ... pass any ... ex post facto Law...." *Id.*, § 10, cl. 1. The Supreme Court of the United States has interpreted that clause to prohibit "laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." *Morales*, 514 U.S. at 504 (quotations omitted).

As an initial matter, we agree with Hollawell that 61 Pa. Cons. Stat. § 331.1 constitutes a "law" for *Ex Post Facto* purposes. It is legislation that clearly directs which factors the Parole Board must consider in exercising its discretion to grant or deny parole. Although one does not have a constitutional right to parole, and a decision to grant or deny parole to a Pennsylvania inmate is a discretionary one that is not subject to direct judicial review, *Coady*, 770 A.2d at 289, a parole decision can be collaterally attacked on constitutional grounds, including the *Ex Post Facto* Clause. Indeed, the Supreme Court has recently considered two appeals concerning when a retroactive change in parole rules violates the *Ex Post Facto* Clause. In *Morales*, the Court upheld a California law that authorized its Parole Board, after the first parole hearing, to hold following parole hearings in two or three years rather than one year, provided that the Board found that the prisoner would not reasonably be expected to be suitable for parole in the next year or two, respectively. 514 U.S. at 507. In *Garner v. Jones*, the Court upheld a similar Georgia law that allowed the Parole Board to increase the interval between hearings from a maximum of three years to eight years. 529 U.S. 244, 247 (2000). Thus, changes in the law that effectively extend the time before parole rehearings can occur do not necessarily violate the *Ex Post Facto* Clause.

The test set out in *Morales* for determining whether a parole law amendment violates the *Ex Post Facto* Clause involves a two-step inquiry. First, the court must determine "[w]hether [the amendment] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509. If not, then the amendment may nonetheless still violate the *Ex Post Facto* Clause if the challenger "demonstrate[s], by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will

result in a longer period of incarceration than under the earlier rule." *Garner,* 529 U.S. at 255.

Regarding the first inquiry, the Court in both *Morales* and *Garner* took care to expressly distinguish the amendment before it - amendments relating to the timing of an offender's parole hearings - from an amendment relating to "the standards for ... determining his suitability for parole." *Morales,* 514 U.S. at 507; *Garner,* 529 U.S. at 250. This case presents a question of that latter type, *viz.,* whether retroactive application of a parole statute amendment expressing for the first time that "the board shall first and foremost seek to protect the safety of the public" violates the *Ex Post Facto* Clause.

In *Mickens-Thomas,* this court answered the question affirmatively. Thomas had been serving a life sentence, without the possibility of parole, for the rape and murder of a twelve-year-old girl in 1964. 321 F.3d at 376. Governor Casey commuted the life sentences of Thomas and 26 others, thereby rendering them eligible to apply for parole. *Id.* at 377. Thomas applied for parole three times between 1996 and 2000. *Id.* at 380-83. Despite release recommendations from Department of Corrections staff, Thomas's participation in counseling and therapy, and favorable psychiatric evaluations, the Board denied his application each time, referring in the first two denials to Thomas's "assaultive instant offense" and "very high assaultive behavior potential," *id.* at 381-82, and stating in the final denial that "the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole," *id.* at 382. Of all the prisoners who had had their life sentences commuted by then-Governor Casey, Thomas was the only one not released on parole. *Id.* at 385.

The court in *Mickens-Thomas* held that Pennsylvania's change to the parole statute altered the manner in which the Parole Board weighed public safety in making parole decisions:

> The record is convincing that after 1996, the Board applied to the public safety interest far greater weight. The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre- 1996, a prisoner could be denied parole because of public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Id. The court described the statistical evidence as "staggering," noting that in 266 historical instances of commuted life sentences, Thomas was the only one not granted parole within his first two attempts. *Id.* The court accordingly ordered that Thomas's parole application be remanded to the Parole Board for review under the pre-1996 rules. *Id.* at 393.

We are aware of the recent decision of the Pennsylvania Supreme Court considering whether the statutory amendment violates the *Ex Post Facto* Clause: *Winklespecht v. Pa. Bd. of Prob. & Parole,* 813 A.2d 688, 692 (Pa.2002). The Court there held that the Pennsylvania amendment was merely a new expression of a standard that had previously been inherent in the law. However, *Mickens- Thomas* is a precedent of this court, binding unless overruled *en banc* or by the Supreme Court of the United States, and the Commonwealth's arguments attempting to distinguish *Mickens-Thomas* are not convincing. First, as explained above, we do not accept the Commonwealth's contention that we need not reach the merits of Hollawell's *Ex Post*

Facto claim because he has not exhausted his state remedies. Second, the Commonwealth's contention that the *Mickens- Thomas* decision is predicated on a factual record not developed in this case, although true, does not have the effect that the Commonwealth urges. *Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto* Clause. Moreover, to the extent that that holding is premised on factual evidence of the amendment's practical effect, Hollawell might rely on that same evidence and achieve the same result if we were to needlessly remand this case for factual development in the District Court. Third, and finally, this panel of the court cannot, as the Commonwealth would like, overrule *Mickens-Thomas* even if we might disagree with it. It is binding precedent that we must follow.

Accordingly, we vacate the decision of the District Court in *Hollawell II* and, as the *Mickens-Thomas* panel did, 321 F.3d at 393, remand for the District Court to order the Pennsylvania Board of Probation and Parole to re-adjudicate Hollawell's parole application applying the pre-1996 statute and corresponding rules.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HOLLAWELL, Petitioner	:	No. 4: CV-00-1222
	:	Petition filed
v.	:	7/10/00
	:	
FRANK D. GILLIS, ET AL., Respondents	:	(Judge Muir)

ORDER
December 21, 2000

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 10, 2000, John Hollawell, an inmate at the State Correctional Institution, Coal Township, Pennsylvania, ("SCI-Coal Township"), filed a petition for writ of habeas corpus. Named as Respondents are Frank D. Gillis, the superintendent of SCI-Coal Township and William Ward, the Chairman of the Pennsylvania Board of Probation and Parole. Hollawell paid the $5.00 filing fee.

In the petition for writ of habeas corpus, Hollawell who is serving a 6 ½ to 23 year sentence requests that the court direct the Parole Board to grant him parole. Hollawell's minimum sentence expired on November 2, 1994, and his maximum sentence will expire on May 2, 2011. The above-captioned case was assigned to us but referred to Magistrate Judge J. Andrew Smyser for preliminary consideration.

On October 13, 1999, Magistrate Judge Smyser issued a report in which he recommended that Hollawell's

petition for writ of habeas corpus be denied. Hollawell filed objections to the report of Magistrate Judge Smyser.

When objections are filed to a report of a magistrate judge, we make a de novo determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. United States vs. Raddatz, 447 U.S. 667 (1980); 28 U.S.C. § 636(b)(1); Local Rule 72.31. District judges have wide discretion as to how they treat recommendations of the magistrate judge. Id. Indeed, in providing for a de novo review determination rather than a de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. Id. See also Mathews vs. Weber, 423 U.S. 261, 275 (1976); Goney vs. Clark, 749 F.2d 5, 7 (3d Cir. 1984).

On July 21, 1999, the Pennsylvania Board of Probation and Parole denied Hollawell parole. The Parole Board stated:

> Following an interview and review of your file the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to: be reviewed in or after September 2000.

In his petition, Hollawell alleges that the Parole Board's July 21, 1999, denial of parole was a violation of the Ex Post Facto Clause of the United States Constitution. Specifically, he claims that the Parole Board applied a 1996 amendment to 61 P.S. § 333.1 when considering him for parole.

At the time Hollawell committed his offenses, 61 P.S. § 333.1 stated as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Section 331.1, as noted above, was amended in 1996 and now states as follows:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the boards hall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Hollawell contends that the amendment which includes the provision that the Parole Board "shall first and

foremost seek to protect the safety of the public" has been applied to him in violation of the Ex Post Facto Clause.

The United States Constitution forbids ex post facto laws. U.S. Const. Art. I, § 9 & 10. The Ex Post Facto Clause is directed at laws that retroactively alter the definition of a crime or that increase the punishment for criminal acts. California Dept. Of Corrections vs. Morales, 514 U.S. 499, 504 (1995). Before a court may conclude that a law violates the Ex Post Facto Clause the law must be shown to (1) be retrospective and (2) be disadvantageous to the offender affected by it. Weaver vs. Graham, 450 U.S. 24, 29 (1981).

Retroactive changes in laws governing parole may in some instances violate the prohibition against ex post facto laws. Garner vs. Jones, 120 S.Ct. 1362, 1367 (2000). However, "the Ex Post Facto Clause should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" Id. At 1367 (quoting *Morales*, supra, 514 U.S. at 508). The Ex Post Facto Clause does not forbid every legislative change that has any conceivable risk of affecting a prisoner's punishment. *Morales*, supra, 514 U.S. at 508. The most important inquiry is whether the change creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." Id. at 509. The prisoner "must show that as applied to his own sentence the law creates a significant risk of increasing his punishment." Garner, supra. 120 S.Ct. at 1370.

Furthermore, in reviewing a change in a state law relating to parole all of the statutory procedures relating to parole must be considered to determine whether the amended statute is more onerous than the original parole procedures. Crowell vs. U.S. Parole Comm'n, 724 F.2d 1406, 1409 (3d Cir. 1984). In the present case, although

the old version of 61 P.S. § 331.1 did not contain a directive that the Parole Board protect the public, protection of the public was always a factor the Parole Board was obliged to consider. 61 P.S. § 331.21 which was in existence at the time Hollawell committed his offenses states as follows:

> The Board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and *it does not appear that the interests of the Commonwalth will be injured thereby.*

(Emphasis added.) Both before and after the 1996 amendment to § 331.1, the Parole Board was charged with protecting the public. The law in this respect did not change.

Retroactive legislation is subject to challenge only if it involves a deprivation of legitimate expectations or upsets settled transactions. General Motors Corporation vs. Romein, 503 U.S. 181, 191 (1992). Prior to the 1996 amendment Hollawell had no legitimate expectation that the Parole Board would disregard the possible danger to the community if he were released on parole. Consequently, Hollawell cannot establish a violation of the Ex Post Facto Clause.

Hollawell has also objected to the manner in which the Parole Board responded to the petition for writ of habeas corpus. The Parole Board initially responded to the petition by filing a motion to dismiss. Magistrate Judge Smyser denied that motion and directed that the Parole Board file a response. We see no impropriety in the

manner in which the Parole Board initially responded to Hollawell's petition.

Hollawell also claims that Magistrate Judge Smyser showed preferential treatment to the Parole Board. Magistrate Judge Smyser rejected several of the Parole Board's contentions, including that Hollawell failed to exhaust state court remedies. Hollawell's claim that Magistrate Judge Smyser showed preferential treatment to the Parole Board is devoid of any merit whatsoever.

The report of Magistrate Judge Smyser is free from error. Because we find no error in Magistrate Judge Smyser's report we shall adopt it as our own and deny Hollawell's petition for writ of habeas corpus.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The report of Magistrate Judge Smyser filed November 2, 1999, is adopted in toto.

2. Hollawell's petition for writ of habeas corpus is denied.

3. The Clerk of Court shall close this case and send a copy of this order to Magistrate Judge Smyser.

4. Any appeal from this order will be deemed lacking in probable cause, i.e., a substantial showing of the denial of a constitutional right, and a certificate of appealability will not issue.

/s/
MUIR, U.S. District Judge

PRECEDENTIAL
Filed February 21, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2047 & 02-2213

LOUIS MICKENS-THOMAS
Appellant in No. 02-2213

v.

DONALD VAUGHN, SUPERINTENDENT;
PENNSYLVANIA BOARD OF PROBATION AND PAROLE;
THE PENNSYLVANIA BOARD OF PARDONS; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA

Pennsylvania Board of Probation and Parole
Appellant in No. 02-2047

Appeal from the United States District Court for the
Eastern District of Pennsylvania
D.C. No.: 99-cv-06161
District Judge: Honorable Ronald L. Buckwalter

Argued: December 19, 2002
Before SLOVITER, McKEE, and ROSENN, Circuit
Judges
(Filed February 21, 2003)

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OPINION OF THE COURT

ROSENN, Circuit Judge:

This appeal has its genesis in the material modification of parole laws by the Pennsylvania legislature in 1996 and corresponding changes in the parole decisionmaking policies of the Pennsylvania Board of Probation and Parole ("Board").[1] As a consequence, the post-1996 parole regime placed primary consideration on the risk to public safety by the parole petitioner as the

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[1]The Board is the only named party electing to participate in this appeal, and the only party against whom our judgment in this case applies.

dominant factor in evaluating parole applications. The United States District Court for the Eastern District of Pennsylvania held that the Board retroactively applied this policy change adversely to the parole applications of Louis Mickens-Thomas ("Thomas"), in violation of the Ex Post Facto clause. The Commonwealth timely appealed; Thomas cross-appealed on his claim that the Board violated his due process rights when it denied his parole applications. We affirm.[2]

I.

A. Pre-1996 Parole Considerations in Pennsylvania

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[2]The District Court exercised jurisdiction under 28 U.S.C. § 2254(a). We have appellate jurisdiction under 28 U.S.C. § 2253. Section 2253 requires that, in habeas appeals where the alleged unlawful detention arises out of process issued by a state court, a certificate of appealability is required before appeal by a habeas petitioner will be heard. A certificate of appealability was issued by the District Court, and thus our jurisdiction is proper. Moreover, such a certificate may be unnecessary because the Commonwealth initiated the appellate proceedings, and the petitioner merely filed a cross-appeal. See *Rios v. Wiley*, 201 F.3d 257, 262 n. 5 (3d Cir.2000). Although it appears state court recourse was exhausted by an appeal to the Pennsylvania Supreme Court, that case is not part of this record. However, exhaustion is not jurisdictional and is waivable. *Narvaiz v. Johnson*, 134 F.3d 688, 693 n. 1 (5th Cir.1998). Inasmuch as the Board has not made an issue thereof, exhaustion is deemed waived. We exercise plenary review in a habeas proceeding over a district court's legal conclusions, and we review factual findings for clear error. *Rios*, 201 F.3d at 262. The relevant facts in the case before us are largely undisputed, and our decision rests upon the application of the Ex Post Facto clause to the facts at issue. Therefore, our review of the District Court is plenary.

Thomas is currently serving a life sentence for the 1964 rape and murder of a 12-year-old girl in Philadelphia, Pennsylvania. The parties agreed to vacate the original guilty verdict because of the unreliability of the expert whose testimony connected fibers and microscopic particles found on the victim to Thomas. In 1967, the state trial court granted Thomas a new trial; in 1969, he was again convicted.[3] His second conviction was upheld by the Pennsylvania Supreme Court in 1972. However, Thomas still professes innocence. Thomas is presently 74-years-old and has been in prison for nearly 40 years. His current efforts to seek release on parole have garnered the strong support of prisoner advocates, incurred the equally vehement opposition of the Philadelphia District Attorney, and have attracted considerable media scrutiny.

Life sentences in Pennsylvania presumptively exclude any possibility of parole. The only exception occurs when the governor-appointed Pardons Board recommends commutation of the inmate's sentence by majority vote, and the Governor subsequently approves the commutation. Thomas was one of only 27 sentences commuted by former Governor Casey out of nearly 3000 life terms being served during his tenure as governor. By the terms of his commutation. Thomas became eligible for parole on July 21, 1996. In recommending commutation, the Pardons Board noted Thomas's attainment of a college degree, his participation in Alcoholics

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[3]More specifically, the first conviction was rejected because the prosecution's lead witness, a technician who matched fibers and debris from Thomas's shoe repair shop to those found on the girl's body, was found to have falsified her credentials and to have perjured herself in another case. At the second trial, the technician's supervisor corroborated the technician's testimony and vouched for the correctness of the analysis.

Anonymous, his participation in sex-offender therapy, the support of the Corrections Department, the long length of time served, the numerous recommendations from scholars, religious, and community leaders, and Thomas's overall maturity and stability.

Following a commutation, a prisoner seeking to be released must still submit to the same parole procedures applicable to all other prisoners. Furthermore, the parole must first be approved by the Board, which virtually has unreviewable power to grant or deny the parole application. Around the time of Thomas's eligibility for parole, new appointments of then-Governor Ridge were placed on the Board in 1995;[4] a parolee from the Pennsylvania prison system was arrested for murder in New Jersey in 1995; and in early 1996 a Pennsylvania Senate committee, in view of the New Jersey arrest, strongly recommended that the Board place added emphasis on community safety. In December 1996, Pennsylvania enacted a change in its law concerning the Board's mission, which arguably placed greater emphasis on public safety as a criterion for parole release.

In December 1996 the Pennsylvania legislature modified the law governing parole in Pennsylvania. The new language, inserted into the aspirational introductory provision of the Pennsylvania parole statutes, provides that the public safety must be considered "first and foremost" in the Board's execution of its mission. The

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[4]Three of five members of the Parole Board were Governor Ridge appointees in 1995. In 1997, after changes in parole laws increased the size of the Board, six out of eight were Ridge appointees.

relevant statute, in its post-1996 form, provides as follows:[5]

> § 331.1. Public policy as to parole
>
> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison. In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

61 P.S. § 331.1

The 1941-1996 statute, in effect at the time of Thomas's conviction, made no specific mention of public safety. It provided:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and

---

[5]This provision is a preface to a comprehensive set of rules governing parole in Pennsylvania. Other provisions too were changed in 1996, but none materially for the purposes of this case.

> efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

To assess this modification of the statute, one must regard this change in the context of recent policy statements issued by the Board and other government officials. Other events coincident with the 1996 revision must also be considered to determine whether, in practice, the parole policies of the Commonwealth have undergone any substantive changes.[6] The Board's 1989 Manual of Operations and Procedures recognized that "[p]robation and parole services must consider that offenders can change their behavior patterns when desirous, capable, and given the opportunity, help, dignity, and respect they deserve as human beings." App. 284. The Manual goes on to state that, in considering an inmate for parole, the Board must "weigh[ ] numerous factors relative to the welfare of the client and the safety of the community," including seriousness of the offense; length of the sentence; institutional adjustment (behavior and program adjustment); and assessment of the effect of rehabilitation services while incarcerated. Whether the individual can be safely supervised in the community, personality characteristics, any history of family violence, strength of the parole plan (home and employment), testimony from victims, and opinions of the sentencing judge and prosecuting attorney must also be considered.

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[6]The Board argues that the statutory provision pertains only to supervision of inmates previously granted parole, and not to the determination of parole eligibility. However, even if this were so, the plain language of the statute is merely one barometer of a change in parole policy. Accordingly, we look to all the Board's actions and statements of policy to determine how it interpreted the statutory provisions.

In reaching its parole decision, "[t]he Board ... feel[s] that an individual should be given every consideration for parole at the expiration of the minimum sentence." App. 285. The 1990 Board-authored "Parole Decision Making Guidelines: A Statement on Policy Procedure and Philosophy," stated that "[a]n eligibility for parole expresses a philosophy of presumed release unless information reviewed demonstrates by its preponderance that the public safety interests of the community outweigh the liberty interests of the inmate." App. 243.

A decisional protocol called the "Parole Decision Making Guidelines" played a critical role in the Board's decisionmaking process pre-1996. The Guidelines provided an objective prediction of the likelihood of a successful parole by assigning numerical values to various criteria, based on historical patterns of parolee recidivism rates. According to the Board authored 1991 "Guidelines: A Special Report Prepared for the House Judiciary Committee," the Guidelines considered factors which, based on a study of past instances of recidivism, were predictors of future recidivism in potential parolees. App. 256. For example, historically, those convicted of theft offenses have high recidivism rates. Thus, they are assigned a higher score; similarly, substance abusers are high recidivists, and correspondingly, they have higher scores assigned in the Guidelines. If enough of these negative predictors are present, the aggregate score will fall above a threshold value, and the Guidelines will recommend against parole. App. 246.

In addition to risk of recidivism, "risk to the community" is also a relevant factor under the Guidelines in determining whether parole is warranted. App. 252. Thus the Guidelines, in addition to calculating the risk of recidivism, add additional points for offenders whose post-parole conduct might include violent behavior, categorizing them as having "high assaultive behavior

potential." App. 52. Therefore, a person who initially committed a violent crime will be evaluated as a parole candidate under the Guidelines, based upon his or her risk to the public as a function of both the likelihood of recidivism and the severity of the crime he or she might commit as a recidivist. The Board's 1990 Statement on Policy Procedure and Philosophy notes that

> [i]nherent in the concept of risk management is the notion that some crimes, although less likely to be repeated, have more serious consequences than others if repeated. In other words, although some offenders may be low risk from the viewpoint of recidivism and parole supervision failure, the stakes are high in terms of protecting the public if their new crime is violent or serious in nature. App. 246.

According to the House Judiciary Report, the Guidelines are "related to an empirically sound, criterion-referenced policy assessment which evaluates each inmate in terms of criminal justice policy and normative past practice in parole decision making." App. 256. Although the Guidelines aspire to objectivity in parole decision making, the Board periodically has countermanded their recommendations. The 1990 Statement on Policy, Procedure and Philosophy declared that the Guidelines protocol typically determined "approximately eighty percent of the decisions rendered." App. 247. The Statement notes, however "that the structuring of discretion does not eliminate it; the burden of the decision remains with the decision maker to evaluate the merit of each case." App. 249.

Thus, before 1996, about 20% of such decisions were decided contrary to the Guidelines recommendation. Nonetheless, a discretionary Guidelines departure must give full weight to all the factors, both for and against release. The Report stated that decisions which

countermand the Guidelines are "rarities," and "require written explanation to justify the policy exception." In reaching a decision outside the Guidelines, the Board cannot merely recite factors already incorporated in the Guidelines analysis; instead it must consider "consequential characteristics" of the applicant that are "objectively unique" to the factors already incorporated into the Guidelines analysis.[7] App. 254. A Guidelines worksheet is provided along with the formal numerical protocol, to permit elucidation of non-Guidelines factors reached in a parole decision, as well as a checklist (Part IV.B. of the Guidelines) for designation of common non-Guidelines factors which may have been significant in reaching a decision contrary to the Guidelines recommendation.[8]

In early 1995, Robert "Mudman" Simon, who had been released on parole from his Pennsylvania prison sentence, was arrested and charged with murder in New Jersey.[9] In mid-1995 Simon's release led to the publication of a "System-Wide Assessment" of the Board,

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[7]Factors considered within the Guidelines analysis include substance abuse, prison misconduct, nature of the underlying offense, and victim injury.

[8]These factors include the presence of psychotic or dangerous behavioral characteristics manifested during the parole interview; recent psychiatric reports causing concern; a pattern of habitual offense of assaultive crimes; or an unfavorable recommendation from the Department of Corrections staff.

[9]Former Governor Ridge made a campaign issue of the commutation and release of Reginald McFadden, who also ended up killing again upon his parole in 1994. This was considered by some to be instrumental in the defeat of Ridge's opponent, then-Lt. Governor Singel, who, as a member of the Pardons Board, had voted to release McFadden.

by the Pennsylvania Inspector General, in which it was determined that more emphasis on public safety and on the nature of the underlying crime was needed in making parole decisions. The System-Wide Assessment noted that the Board management generally "has emphasized [inmate] interests over community protection," and that one faction of Board officials perceives "reintegration into society [as] the primary mission," while another faction "focuses ... on the protection of society." App. 297.

The Chairman of the Pennsylvania Senate Judiciary Committee, reporting on the investigation of the parole of Simon, published in February 1996, noted that following a 1989 prison riot in Pennsylvania, "reduction in prison overcrowding through the parole process became an objective of [the Board] coequal with assuring public safety." App. 326. The Report also noted that the Board recently "has set out to establish public safety as a priority including a more careful review of parole eligible cases." App. 343. Accordingly, the Report recommended that "[e]xisting statutes and policies should be looked at, amended, restated and/or purged as necessary to effectuate the *new corrections philosophy* of Pennsylvania [emphasizing] *public safety*...." App. 351 (emphasis added.)

The Board's self-assessment report, entitled "Fiscal Years 1995-1997 Biennial Report," stated that "[i]n recent years, the Governor and General Assembly have mandated through statute that the foremost concern for the Board must be the protection of the safety of the public...." The Report went on to note recent "heightened awareness and concern for public safety," which prompted it to institute more careful review procedures for cases involving "violent offenders." App. 219. Thus, both the Judiciary Committee Report of February 1996 and the contemporaneous Biennial Report gave public

notice that henceforth the "foremost concern" of the Board would be the safety of the public.

B. Thomas's Parole Applications

We now turn to the effect of the Board's new policy on Thomas's parole application. When Governor Casey commuted Thomas's sentence, he authorized the Department of Corrections to "prerelease" Thomas, presumably into a transitional facility, prior to Thomas's parole-eligibility date. This the Corrections Department declined to do. App. 663. Then, in the Board's first review of Thomas's case in September 1996, it also declined to parole him on the ground that, under the new law passed in 1995, "prerelease" was made a necessary precondition of parole. The Commonwealth Court heard Thomas's mandamus action in which he sought to direct the Board to hear his parole petition. In that case, the Board conceded that its application of the "prerelease" law violated the Ex Post Facto clause. The court remanded the case to the Board, and ordered it to hear the merits of the parole application and issue its decision within 10 days. See *Mickens-Thomas v. Pennsylvania Board of Probation and Parole,* 699 A.2d 792 (Pa.Commw.Ct.1997).

Soon thereafter, in August 1997, the Board issued its decision, relying in part on its Decision Making Guidelines to reach a conclusion as to parole eligibility.[10] Thomas received a Guidelines-based recommendation for release, App. 432, along with the recommendations of all voting Department of Corrections institutional staff,

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[10]The Guidelines manual states that they were "designed to represent observable standards of justice in making decisions and to link behavior with societal sanctions in a clearer manner.... A process of structured review acts to balance the inmate's liberty interest with the interests of society for a safe and secure community."

including the prison counselor and housing officer. See Department of Corrections Vote Sheet, March 11, 1996, App. 631. Thomas demonstrated his participation in pre-release counseling, including Alcoholics Anonymous and sex offender therapy, as well as participation in college courses and job training. Thomas also had post-release support networks in place. App. 44. Nonetheless, the Board denied Thomas parole in 1997. The Board stated its reasons for the denial in a formal letter to Thomas called the "Board Decision." The reasons given were as follows: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Unfavorable recommendation from District Attorney. Conviction of prior assault offense." App. 441. Many of these factors were automatic designations; for example, Thomas's past crime was a sex offense, which caused him to be automatically classified on the Board Decision as having "very high assaultive behavior potential." App. 52; Board Reply Brief 14.

The Board's 1997 Decision urged Thomas to secure the following before his next application review: investigation of a home plan; the availability of out-patient sex-offender treatment; participation in a program plan prescribed by Department of Corrections officials; maintenance of a good conduct record; a continuing institutional recommendation for parole; and an evaluation by mental health professionals, with experience with sex offenders. The Board made these recommendations in spite of Thomas's apparent compliance with all of the Board's suggestions prior to the hearing. For example, he had a good conduct record and the endorsement of prison staff.

The Board urged a psychiatric examination, despite the existence of a pre-commutation 1993 psychiatric

report supporting Thomas's release.[11] There were other psychological evaluations in his file that did not contraindicate release. Although Thomas had engaged in sex offender therapy, there is some indication, based on handwritten notes on the Board's decision making worksheet, that the Board may have been troubled by Thomas's presence in a "deniers" group--those who deny responsibility for the underlying offense-- rather than an "admitters" group App. 434. The Board Decision makes no specific mention of the admitter-denier distinction, and its internal notes make only passing mention of the issue.[12] Later, in 1997, the Pennsylvania Supreme Court heard Thomas's habeas petition but summarily denied it.

Thereafter, Thomas apparently complied with all of the Board's prerequisites stated in its 1997 Decision. He maintained the positive recommendation of corrections authorities, who once more unanimously recommended his release and noted that he was in compliance with treatment programs. The prison counselor, corrections officer and psychologist all endorsed his release. App. 634. He continued to participate in a sex-offender therapy program--although it was a "deniers" program--along with an Alcoholics Anonymous program. Post-release support networks were in place. And the Guidelines assigned

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[11]In particular, the Board seemed concerned, in its 1997 Guidelines worksheet, that Thomas had only undergone psychological, and not psychiatric evaluations. This 1993 report, authored by a psychiatrist, belies the Board's claim that Thomas had never received a psychiatric evaluation.

[12]The Board is not required to give every reason for its denial on the Board Decision. App. 248. However, its internal notes fail to show that it considered the admitter-denier problem to be a serious matter. The issue is merely mentioned in a neutral way.

Thomas a risk- assessment score which militated in favor of release. App. 424.

Despite his compliance with essentially all of the Board's conditions, it again denied parole in March 1998, stating: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Your need for counseling and treatment." App. 440. In this latest Board Decision, it again advised Thomas to seek counseling and treatment, to participate in prescribed programming, to maintain a clean record and obtain institutional recommendation for the purposes of his next application. Unlike the 1997 decision, the 1998 decision recommended no specific sex offender treatment, nor mentioned in its internal decision making worksheet that Thomas was in a "denier" group. Moreover, despite the comment that Thomas needed "counseling and treatment," psychiatric and psychological evaluations did not contraindicate his release. Presumably in response to the 1997 Board Decision's admonition that Thomas needed to be evaluated by a mental health professional, the Board noted, in its worksheet, that a 1998 psychological evaluation showed Thomas to be an "average risk candidate." App. 426. The Department of Corrections psychologist, in the 1998 Vote Sheet, noted "No Psychological Contraindications" for release. App. 634.

A 1996 psychological evaluation did show an "antisocial personality," and "possible sexual preoccupation and psychosexual immaturity." App. 623. However, the decisionmaking worksheet does not reflect that the Board was deeply concerned with those findings, and instead only made mention, in a handwritten notation, of the 1998 psychological report's conclusion that Thomas was an "average risk candidate." No notation was made of two earlier psychological evaluations, which had more clearly favored release. One 1993 report called

Thomas "a good candidate for commutation from the psychological perspective." App. 649a. A second 1993 psychiatric report added there was no "psychiatric contraindication [to commutation]" and that Thomas "has developed significantly during his years of imprisonment." App. 650. In December 1999, Thomas sought a writ of habeas corpus in the United States District Court.

Again, the Board denied his parole in 2000, during the pendency of these habeas corpus proceedings. The Board gave as its reason the cryptic statement that it "has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." App. 439. Again, all voting members of the Department of Corrections institutional staff, including his counselor and work supervisor, unanimously recommended his parole. App. 624. Again, he demonstrated a continued record of good conduct in prison and participation in sex offender therapy and all other programming prescribed by the Department of Corrections. Nonetheless, the Board denied parole. Again, the Board advised Thomas to maintain his Department of Corrections recommendation as a precondition for consideration at his 2002 parole hearing. But, in 2000 the Board revived its 1997 recommendation that Thomas should undergo sex offender therapy as a suggested pre-condition for release. Handwritten notes again show that the Board may have been concerned that he was in a "denier" group — although, once more, no mention of this concern is made in the formal Board Decision. The lack of admitter therapy is simply stated in a neutral, non-critical way in the Guidelines worksheet. App. 415.

Finally, although the decision-making guidelines had assigned Thomas a favorability score that counseled in favor of parole on both the 1997 and 1998 applications,

the 2000 decision, despite no evidence of changes in his situation, reached a different outcome. App. 414. The Board interviewer classified Thomas as a habitual substance abuser on the Guidelines form, which increased Thomas's risk score by 3 and placed him in an unfavorable category for release. The Board did not indicate why it made this material alteration to what appears to be a boilerplate risk-assessment protocol. Thomas apparently did have a record of alcohol abuse prior to his incarceration in 1964 (for which he attended Alcoholics Anonymous while in prison) but it is unclear why, if past alcohol abuse over forty years ago was a relevant factor, it had not been considered on his two prior Guidelines evaluations.

Moreover, the Guidelines were modified since his last application, with a score of 2 now added to Thomas's overall score as a result of "Victim Injury" (the past two evaluation forms assigned only a score of "1" for Victim Injury). As a direct result of these changes Thomas's score ascended to nine, placing him in a category exceeding seven. Therefore, the Guidelines contraindicated parole. In summary, the Board denied Thomas parole a total of three times, in 1997, 1998 and 2000, although he complied each time with all of the Board's recommendations, except for his continued enrollment in the deniers group. The Board denied parole to Thomas alone of all 266 prisoners whose life sentences had been commuted.

In Thomas's current habeas petition, he alleges that the Board denied his parole in violation of the Ex Post Facto clause, by applying retroactively the revised December 1996 parole statute. According to Thomas, he had a constitutional expectation that his parole petition would be evaluated under the laws in effect when he was convicted. The District Court agreed that the Board violated the Ex Post Facto clause by applying the 1996

statutory mandate. However, the Court declined to rule outright that Thomas would have been paroled under the prior rule; instead, it remanded the case to the Parole Board to rehear the matter under the pre-1996 laws. Thomas also asked that the District Court order his release on the grounds that his due process rights were violated. The District Court held that, although Thomas had complied with all the seeming prerequisites for relief as prescribed by the Board, the presence of any evidence sufficient to show that the Board based its decision on a rational and good faith exercise of discretion, vindicated its action. Thus, the District Court concluded, there was no due process violation. See *Mickens-Thomas v. Vaughn*, 217 F.Supp.2d 570 (E.D.Pa.2002).

The District Court remanded the case to the Board to apply its pre-1996 parole policies to the Thomas petition. The Board appealed, and Thomas cross- appealed, on the denial of his due process claim and on the court's failure to grant him release outright as a result of the Ex Post Facto violation.

II. Ex Post Facto Violation

A. The New Parole Policy of 1996

The Ex Post Facto clause of the United States Constitution applies to a statutory or policy change that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 506 n. 3 (1995). A new law or policy violates the Ex Post Facto clause (1) when it is retrospective, i.e., when it "appl[ies] to events occurring before its enactment," and (2) when it "disadvantage[s] the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981); see *Coady v. Vaughn*, 251 F.3d 480, 488 (3d Cir.2001). As to the first criterion for an Ex Post Facto violation, the Board strenuously

argues in its brief (p. 14) that "the 1996 amendments ... did not change the Board's standards for determining parole." First, it asserts that Pennsylvania's statement of public policy for parole, 61 P.S. § 331.1, refers to the supervision of parolees, rather than to conditions of release.

The foregoing argument has little merit. The statute unequivocally has been interpreted by Pennsylvania courts to express broad and general aspirations of Pennsylvania's parole policy. See *Stewart v. Pennsylvania Bd. of Probation and Parole,* 714 A.2d 502, 508 (Pa.Commw.Ct.1998) ("Section 1 of the Parole Act, 61 P.S. §§ 331.1, ... enunciates the state's public policy concerning parole...."). The essential matter before us is not whether the statute on its face pertains to parole decisionmaking, but whether, in practice, the new language has altered the fundament for reviewing parole applications. See *Garner v. Jones,* 529 U.S. 244, 256 (2000). We look beyond the language of the statute and examine the Board's pronouncements of policy and its public statements that shed light on the interpretation of its statutory mandate. These suggest that after 1996 the Board gave foremost importance to the public safety factor. This is confirmed by the report in the September 20, 2000 *Harrisburg Patriot-News,* when then-Board chairman William Ward observed that legislative changes around 1995 recast the Board's mission to put public safety first.

The Board also asserts that its policy historically has placed equal emphasis on the interests of the inmate and the interests of public safety, and it points in its brief to us to statutory language in effect in the 1940s to prove this point: "whenever in its opinion [1] the best interests of the convict justify or require his being paroled and [2] it does not appear that the interest of the Commonwealth will be injured thereby," a prisoner will be granted parole.

Board Brief at 11-12. The Board correctly notes that the potential risk to public safety in granting parole has always been a consideration in the decisional process. It claims that other provisions of the parole statute have, under both the earlier and the current versions, required that the Board "consider the nature and circumstances of the offense committed, [and] the general character and background of the prisoner." 61 P.S. § 331.19.[13] However, to state that public safety was always a consideration does not mean that the Board gave it the same weight after 1996 in the decisional equation.

The record is convincing that after 1996, the Board applied to the public safety interest far greater weight. The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of public safety concerns only if those concerns

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[13]The provision provides in pertinent part:

> It shall be the duty of the board ... to consider the nature and circumstances of the offense committed, any recommendations made by the trial judge and prosecuting attorney, the general character and background of the prisoner, participation by a prisoner who is serving a sentence for a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) in a victim impact education program offered by the Department of Corrections and ... the testimony of the victim or the victim's family.... The board shall further consider the notes of testimony of the sentencing hearing, if any, together with such additional information regarding the nature and circumstances of the offense committed for which sentence was imposed as may be available. The board shall further cause the conduct of the person while in prison and his physical, mental and behavior condition and history, his history of family violence and his complete criminal record ... to be reported and investigated.

together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

The Pennsylvania courts have suggested that the 1996 public safety directive has caused the Board to review the petitions of violent offenders with redoubled scrutiny: "As a result [of statutory and policy changes in 1996], violent offenders are subjected to a more stringent standard of review for parole eligibility than nonviolent offenders. The purpose behind the classification and the disparate treatment between the violent and nonviolent offenders is the protection of public safety." *Myers v.. Ridge,* 712 A.2d 791, 799 (Pa.Commw.Ct.1998). Furthermore, the policy change around 1996 took place in the ambience of numerous policy statements that shed light on the Board's interpretation of its statutory mission: it clearly viewed its statutory mandate to require special emphasis on public safety.

Our attention is directed to the 50th Anniversary Report of the Board (1991), which states in its concluding paragraph that "protection of society" is the Board's "primary goal." App. 187. Read in context, however, this passage applies to the board's supervision of parolees. This same passage provided that "conditional release" permits the Board to meet its goal of protecting society. An earlier section of the document states that "[t]he immediate goal of parole supervision is the protection of society," by closely supervising the parolee and setting "conditions" for continued release, pertaining to work, health, education or other needs, that ensure smooth reintegration and, hence, the public safety. App. 185 (emphasis added). Upon analyzing this language, it is obvious that the Board meant in this report that "conditional release," with fixed conditions for continued

parole, is designed to safeguard the public after a parole has been granted. Thus, this 1991 anniversary report sheds no light on the post-1996 Board treatment of "public safety" as a factor before parole is granted.

The statistical evidence is quite staggering here, and strongly confirms the change in policy in 1996: of the 266 historical instances of commuted sentences on which the Board has kept records, all were granted parole on the first or second application. Many, if not most, of these original sentences were for violent crimes. Doubtless, these earlier Parole Boards spanned a wide spectrum of political and penological philosophies. Yet, the gubernatorial grant of commutation of sentence had such significance that the Board agreed to parole every commutee on his or her first or second application. The Thomas application is distinguished from these 266 cases only by the intervening policy directive of 1996, emphasizing public safety.

In addition to these statistics, substantive declarations of Board policy strongly support the proposition that, after 1996, the Board applied a new standard. A 1996 report by the Legislative Judiciary Committee strongly exhorted the Board to reform its parole policies by placing greater stress on public safety. A 1997 self-assessment by the Board specifically noted that during the 1995-1997 period, public safety became the Board's new "foremost concern." The new Guidelines, implemented between 1998 and 2000, placed more weight on "Victim Injury." The 2000 Board Decision denying Thomas's parole noted that its action was consistent with the Board's "mandate" to protect the public. This language did not appear on earlier Board decisions and reflects its new parole policy.

These declarations stand in bold contrast to the pre-1996 policies, which commanded that the Board give

weight to various factors in the parole process, such as Department of Corrections staff recommendations, educational accomplishments, job training, and therapy programs. This factor-based approach strongly suggests that dispositive weight should not be given to any one factor.[14] Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. Prior to 1996, a Board recommendation contrary to the Guidelines required that the Board have "appropriate reasons for [its parole denial] decision." Because the pre-1996 Guidelines already factored in the risk to public safety vis-a-vis relevant recidivism indicators, the Board after 1996 could not give added, and certainly not exclusive, weight to public safety in overruling the Guidelines.

We conclude, then, that prior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one factor could not have been the basis of granting or rejecting parole. Policy declarations in and after 1996 demonstrate that Board stance shifted and that, indeed, post-1996 considerations

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[14]The Guidelines themselves embody this philosophy. They are designed so that: "No single reason-for-refusal will justify the denial of parole: a preponderance of negative reasons will countervail release." App. 253.

of public safety became the dominant concern of the Board.

B. Application of New 1996 Policy to Thomas

The possession of a discretionary component in a parole policy does not per se exempt it from constitutional scrutiny. "The presence of discretion does not displace the protections of the Ex Post Facto clause." *Garner,* 529 U.S. at 253; cf. *Winsett v. McGinnes,* 617 F.2d 996, 1007 (3d Cir.1980) (en banc) (holding that prison officials' "discretion must be exercised consistently with the purpose and policy" governing early release program to satisfy due process). A Parole Board policy, although partly discretionary, is still subject to ex post facto analysis when there are sufficiently discernible criteria to suggest to a reviewing body that the new retroactive policies are being applied against the offender's interest.

In this case, as in our *Winsett* decision, a prison release authority is not permitted to circumvent its constitutional obligations merely because it has some discretion: "[I]t is by no means clear that the [relevant authorities] may, under the rules, invoke any criterion [they] choose[ ]." *Winsett,* 617 F.2d at 1006. Rather, the Board has, by both its past decisions to grant parole for commuted sentences, and by its formal declarations of policy, expounded discernible parameters that govern its discretion. See id. Here, the changes in parole policy can be shown to have been applied to Thomas's parole application, even though the Board possessed some discretion both before and after the 1996 policy change.

Although we are unable to express precisely what moved the Board to deny Thomas's petition, there is significant evidence that it acted upon policies that were established after Thomas's crime and conviction. Although discretion inheres within the Board's parole

authority, and new Board members may carry new ideas regarding the exercise of that discretion, and old Board members may change their mind in the light of new considerations, Thomas is nevertheless entitled to have the Board give genuine consideration and due regard to the factors prescribed by the Board's pre-1996 policies. We agree that the Board is entitled to learn from past experiences and mistakes. Board Brief at 17. This is so, just as a legislature might determine sentences for some crimes are too light and order judges to weigh certain factors more heavily in rendering a sentence. That a Board or legislature may learn from experience does not mean that those who were sentenced at an earlier juncture may now be more severely re-sentenced in the light of newly-found wisdom. This is precisely what the Ex Post Facto clause prohibits. Under the Board's reasoning, a determination, founded on newly discovered experience, could, by virtue of the Board's exalted discretion, forever deny a prisoner's preexisting right to parole consideration.

Although some discretion might still exist within the pre-1996 parameters, a parole decision that fails to address any of the criteria mandated by Board policy, such as institutional recommendations, willingness to undergo counseling and educational achievement, and instead utterly ignores all factors counseling in favor of release, falls outside of the realm of the legitimate exercise of discretion under the pre-1996 policies. Inference instructs us that the Board inappropriately relied on policies implemented in 1996, rather than the parole policies in place at the time of Thomas's crime and conviction.

In its briefs to this court, the Board purports to have reasons apart from public safety for its Thomas decisions. Those reasons appear to be asserted primarily as a post hoc defense to the allegations made in these proceedings.

The Board argues that Thomas's "instant assault offense" and "very high assaultive potential," both functions of the nature of the past crime, were not the primary bases on which the decision to deny parole was made. It claims that. upon reading Thomas's file, "it is easy to see why the Board found the [arguments against releasing Thomas] so persuasive." Board Reply Brief at 21. It asserts that numerous reasons were considered in support of its decision, including an unfavorable recommendation from the District Attorney, lack of sex offender therapy, and questionable psychological evaluations. However, these were not bona fide considerations in the decisions to deny parole. Our analysis shows that the primary basis for the parole denials was the risk of potential harm to public safety.

Under the Guidelines, Thomas was entitled to parole at his hearings in both 1997 and 1998. He is the only prisoner out of 266 commuted sentences who was not granted parole in his first or second application. The voting members of the Department of Corrections staff unanimously recommended Thomas for release at each application. The pre-1996 policies place significant weight on factors relating to an inmate's potential to adapt to life on the outside, and on the recommendations of the institutional staff. The pre-1996 policies suggest that no single factor should be controlling in a decision to deny parole to an applicant. Moreover, the pre-1996 Decision Making Guidelines were given significant, although not dispositive weight. A departure from the Guidelines required a recitation of unique factors, outweighing those in the Guidelines analysis. The Board Decisions on each of Thomas's parole hearings rely heavily on "high assaultive behavior potential," which relates primarily to the nature of the original offense, despite many other significant factors favoring parole.

Thus, reviewing the pre-1996 documents pertaining to parole, it becomes evident that, although the risk of potential danger to the public has always been a factor, it became the controlling feature of the Board's decision after 1996. The Board defaulted in its duty to consider factors other than the underlying offense and risk to public safety; it has failed to address any of the factors favoring release.

C. Board Decisions

In 1997, after the Department of Corrections denied Thomas pre-release, soon thereafter the Board denied Thomas parole on the very ground that he had not undergone a pre-release phase. The statutory pre-release requirement was adopted after Thomas's sentence was commuted. The Board later conceded in a state court suit initiated by Thomas that the law concerning the pre-release requirement should not have been applied to him. The Board's actions in this respect conveniently disregarded the Ex Post Facto clause to support its decision to deny parole.

We have carefully analyzed the Board's reports of disposition of Thomas's parole applications. The Board's 1997 and 1998 Decisions denied Thomas parole on the basis of several summary factors, including the severity of his underlying offense, his potential for future assaults, a prior assault offense, adverse recommendation from the District Attorney,[15] and Thomas's need for counseling and treatment. The Board also set forth suggestions, presumably to improve Thomas's next effort for parole, including participation in prescriptive programming, good prison conduct, sex

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[15]We discount the 1997 Board Decision's reliance on the District Attorney's recommendation because it does not reappear on any later Board Decisions.

offender therapy, and positive psychological evaluations. All of these appear to have been met prior to the 1997 and 1998 decisions: All voting officials from the Department of Corrections recommended parole in both 1997 and 1998; he had complied with all prescriptive programming; a 1993 psychological and a psychiatric evaluation, made in anticipation of his commutation hearing, recommended release. The 1998 Department of Corrections Vote Sheet showed "No Psychological Contraindications" to release; he had participated in sex offender therapy; he had job training; and he had a post-release support network in place. Rather than explain in what manner its recommendations had not been met, or what additional steps needed to be taken, or whether some insurmountable barrier existed to Thomas's parole, the Board essentially reiterated the same recommendations for improving Thomas's parole candidacy in each subsequent Decision.

Given its indifference to Thomas's efforts to improve his parole candidacy, and its repeated reliance on Thomas's "instant offense" and his potential for future "assaultive behavior," despite the Guidelines' finding that Thomas was not a recidivism risk, the Board appeared to rely exclusively on the nature of the underlying offense and the potential danger to the public if Thomas were released. However, the Board, in its briefs to this court, suggested it had other reasons than public safety, and submitted that Thomas had only participated in "denier" sex offender therapy, rather than "admitter" therapy; that is, he was engaged in a form of therapy for offenders who refused to admit their crimes. This concern did not appear in the formal Board Decisions and, therefore, must be disregarded.

The Board's own internal notes shed light on its deliberations in this regard. We recognize that the Board is not required to share its specific reasons for denying

parole. The Board's internal files in 1997 and 2000, however, merely noted, in a neutral way, that Thomas participated only in denier therapy and denied guilt for his crime without further comment or discussion of how this factor may have outweighed others favoring release. Significantly, the Board in 1997 and 1998 failed to mention lack of responsibility (or any other factor) in the section of the Guidelines worksheet where specific space is allotted to provide unique reasons for departing from a Guidelines recommendation. Instead, we have only the terse Board Decision and the Board's handwritten notes from which to glean its rationale for the parole denial.

In contrast to the scrawled notation of Thomas's lack of admitter therapy in its 1997 and 2000 worksheets, the Board underscores this point now in its briefs to us. Similarly, it discusses in its briefs how the benefits of the inmate sex offender therapy program are not fully realized, unless the inmate admits guilt for his or her crimes. However, the original, official deliberations showed that the Board failed to consider these matters at the times it reviewed Thomas's applications.

Moreover, the recommendation that Thomas receive sex offender therapy, which appeared on the 1997 report, did not appear on the 1998 Decision or worksheet. Then, inexplicably, the recommendation for sex offender therapy reappeared on Thomas's 2000 parole-refusal report. This casts still more doubt on the genuineness of the concern. It is also not clear that the Board's renewed concern over Thomas's "denier" therapy was ever properly communicated to Thomas, given that the reasons for denial in the Board Decision are vague and boilerplate. They nowhere mention the admitter-denier issue.

According to its briefs, the Board, in its 1998 and 2000 Decisions, may have relied on a 1996 psychological report that showed "evidence of possible sexual

preoccupation and psychosexual immaturity," as well as an "antisocial personality." Board Reply Brief at 26. However, there is no evidence that the report recommended against release, and the Board never weighed explicitly the report against the balance of all the other favorable recommendations for release by counselors and corrections staff. No reference was made to two 1993 pre-commutation reports by a psychologist and a psychiatrist, respectively, both strongly recommending commutation.

Furthermore, a 1999 psychological report, although acknowledging the negative factors cited in the 1996 report, never expressly recommended against release. On the contrary, the report made suggestions as to how to structure Thomas's parole once granted. App. 623. Meanwhile, a prison psychologist, on the 1998 Department of Corrections Vote Sheet, recommended release and noted that there were "no psychological contraindications" against release. The Board's own worksheet in 1998 merely noted that psychological evaluations showed Thomas to be an "average risk candidate."

In addition, many of the factors listed in the 1997 and 1998 Decisions were automatic designations. For example, "very high assaultive behavior potential" is assigned to a parole applicant whenever an applicant is convicted of a sexual offense. There is no indication whatever that the Board seriously contemplated the gravity of the public safety threat; nor is there any evidence that the Board followed its own procedures by pointing to factors independent of the Guidelines that counseled against granting parole.

In 2000, the Board again denied Thomas's parole, this time because "the mandates to protect the safety of the public and to assist in the fair administration of justice

cannot be achieved through your release on parole." Although, again, it suggested sex offender therapy, favorable recommendations from Department of Corrections officials, prescriptive programming and continued good conduct, the decisive element of the Board's decision protecting "the safety of the public."

In 1997 and 1998 the Guidelines protocol resulted in a conclusion that Thomas should be released, but he was not. In 2000, the protocol recommended against parole. The data entered into the chart for past substance abuse changed, and thus he was then classified as a habitual offender with history of past abuse. The record shows some alcohol abuse by Thomas, but no drug use. Moreover, this reclassification on the Guidelines worksheet increased his overall objective score and placed him in the range of cases where the Guidelines recommended against parole. There is no evidence that alcohol abuse should, suddenly, as of the 2000 report, be given such significance: The Guidelines recommendation in 2000 is not worthy of consideration because it appears to have been deliberately designed to achieve a non-parole decision.[16]

Most forcefully, the 2000 decision report highlighted the Board's new rationale for denying parole, a rationale which implicitly pervaded all of the Board Decisions on Thomas's application: it bluntly stated that Thomas's release interfered with its mission "to protect the safety of the public." Although public safety had been a part of the Board's pre-1996 criteria, it had never been an

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[16] Also, the Guidelines themselves changed, as of 2000, and victim injury was given a higher value (two points instead of one), militating more strongly against parole. This new valuation was reflected in Thomas's aggregate Guidelines-based score. This further evidences the advent of new policies and emphasis on public safety on the part of the Board.

exclusive, or even the most important, criterion. However, the Board does not attempt to offer any other explanation for its 2000 decision, while, in 1997 and 1998 it summarily recapitulated: "assaultive offense," potential for "assaultive behavior," and "victim injury" as reasons for its parole determinations. The reliance on these factors, and its failure to credibly consider any other factors, leads us to the ineluctable conclusion that the Board relied almost exclusively in 1997, 1998 and 2000 on the nature of the past offense and the potential danger to public safety.

The Board protests that the "assaultive potential" designation does not "require an automatic parole refusal." On the record before us, however, we do not agree. The Guidelines did not show him to be a recidivism risk. The Board did not consider seriously psychological contraindications or any other non-Guidelines factor that might have militated against parole. The Board's denial of Thomas's parole, despite its claims that the decision was the result of the discretion vested in it by the pre-1996 policies, exceeded any reasonable interpretation of the applicable policies. It appears that the Board was applying the new policy. Now, belatedly, in its briefs, the Board seeks to eviscerate the grounds for its decisions with a gloss of compliance with the pre-1996 policies. This will not do.

D. Implications of *Winklespecht*

Since oral argument in this matter, the Board has called to our attention the recent Pennsylvania Supreme Court decision, *Winklespecht v. Pennsylvania Board of Probation and Parole*, 813 A.2d 688, 2002 WL 31898105 (Pa.2002). The Board cites this case in support of the proposition that § 331.1's concern with "protect[ing] the safety of the public," added "nothing new to the parole process and [has] always been [an] underlying concern[]."

Id. The Pennsylvania Supreme Court held that § 331.1 does not change Pennsylvania policy as to the criteria for parole "[n]or did the addition of this (new) language create a new offense or increase the penalty for an existing offense." Focusing on the added language to § 331.1 concerning "protect[ing] the safety of the public" and "assist[ing] in the fair administration of justice," the court concluded that these concepts have always been underlying concerns.

This decision, made after the Board's actions on Thomas's parole, came too late to alter the Board's view of the statutory amendment on the outcome of this case. Not having the benefit of the Supreme Court decision, the evidence before us shows that the Board interpreted § 331.1 to mandate foremost the consideration of public safety. The Board mistakenly construed the 1996 statutory change to signify a substantive change in its parole function. See *Gall v. Parker,* 231 F.3d 265, 304 (6th Cir.2000). As we noted previously, a public statement of the Board chairman and Board policy declaration confirm this substantive change in Board policy. The Pennsylvania Commonwealth Court too understood the 1996 amendment to enact a substantive change in Board policy. See *Stewart,* 714 A.2d at 508; *Myers,* 712 A.2d at 799. The Board's actions and policy pronouncements demonstrate a marked added weight on public safety concerns, uninfluenced by the subsequent Court interpretation of the statute.

E. Adverse Impact of Retrospective Policy on Thomas

As to the second Ex Post Facto criterion, that the change must adversely affect the offender, the Board argues that Thomas, having been sentenced to life, "had no legitimate expectation of ever being paroled." Board Brief at 10-11. It notes that, during the 1970s, only 10% of life sentences were commuted and paroled. That figure

diminished to less than half a percent in the 1990s. The Governor's power to grant commutation was in his absolute discretion, and thus, according to the Board, Thomas's eligibility for parole was entirely speculative. The Board does not dispute that the possibility of parole at sentencing based on some explicit criteria gave rise to a liberty interest. Hence, the procedures for reviewing parole applications must be constitutionally sound.

Garner held that the Ex Post Facto clause prohibited the application of post-conviction laws to prisoners that would result in a significant increase in the chances of prolonged incarceration. 529 U.S. at 251. Prisoners are entitled to know the range of punishments available at the time of sentencing, and during the adjudication of their case, so that they can plea bargain and strategize effectively: The Ex Post Facto clause "(1) ... prevents legislatures from interfering with the executive and judicial roles of prosecution and punishment; and (2) it assures that legislative acts give fair warning of what actions will be punished and the degree to which they will be punished." *Coady*, 251 F.3d at 487-88. Therefore, an offender, prior to his conviction and sentencing, is entitled to know not only his maximum possible punishment, but also his or her chances of receiving early release, since this too is a relevant factor in the plea bargaining calculus. An adverse change in one's prospects for release disadvantages a prisoner just as surely as an upward change in the minimum duration of sentence.

The possibility of commutation existed at the time of Thomas's conviction and sentence. The relevant criterion for determining the applicability of ex post facto analysis is the effect of new policies on "*eligibility* for reduced imprisonment," rather than any fixed guarantee of release. *Lynce v. Mathis*, 519 U.S. 433, 445 (1997) (emphasis added). Therefore, a sentence that contained

the right to parole consideration would give rise to a constitutional expectation that the parole guidelines extant at the time of the crime would be applied. See *Garner,* 529 U.S. at 250. Eligibility for a commutation of a life sentence entails the possibility of parole, albeit a more distant possibility than for sentences that carry the possibility of parole ab initio. It also gives rise to the expectation that the parole criteria in effect at the time of the crime will be applied.

The Board contends that there was never a "significant" possibility, given the unlikelihood of commutation, that Thomas would ever be paroled. *Garner,* 529 U.S. at 256. Indeed, as the Board contends, in most cases of life sentences in Pennsylvania, parole will never be an option as commutations are quite rare. However, as unlikely as these initial prospects for parole might have been, the application of the new parole policies in Thomas's case rendered them even more remote. The new policy "substantially increased the period of incarceration;" it reduced the possibilities of ever obtaining release.

The Board's reliance on *California Dept. of Corrections v. Morales,* 514 U.S. 499, 508-09 (1995) is misplaced. Although the parole policy change in Morales wrought a small change in the average duration of a prison sentence, the change was held to be too minuscule to rise to a constitutional violation. Morales considered the effect of a procedural change in parole law, which provided for a greater wait-period between first and second hearings. *Id.* at 507. Here the substantive criteria for parole release have changed.

Lynce v. Mathis set forth a key distinction between the Morales case and this petition. In *Lynce,* a law in effect at the time of conviction provided that if a prison population reached approximately 98% of its capacity, good conduct

credits needed for early release could be acquired at an accelerated pace. The law was changed during the prisoner's sentence, and his accelerated credits, earned during a time of over-98% prison capacity, were cancelled and parole denied. 519 U.S. at 438-39.

The *Lynce* prison officials argued that, at the time of conviction, it was entirely speculative whether the prison would become overcrowded during the petitioner's incarceration, and thus he was excluded from ex post facto protection under the holding in *Morales*. However, *Lynce* distinguished *Morales*, because there was no evidence in *Morales* that the change affected the petitioner's own sentence detrimentally. *Lynce*, 519 U.S. at 447. In *Lynce*, the population did exceed 98% during petitioner's incarceration, and by his own conduct the prisoner achieved enough credits for good behavior, so that he became eligible for release under the old rules. The change in policy had the effect of increasing the punishment in his individual case and thus violated ex post facto. *Id.*

Thus, under *Lynce's* reasoning, the parole change substantially impacted Thomas in violation of the Ex Post Facto clause. Moreover, Thomas is entitled to the benefits of his good behavior in prison; the opportunity to reduce his sentence through commutation, no matter how speculative, existed at the time of Thomas's crime. Thomas successfully attained a commutation of his sentence; he was entitled to corresponding reduction in sentence. We, therefore, hold that to retroactively apply changes in the parole laws made after conviction for a life sentence in Pennsylvania that adversely affect the release of prisoners whose sentences have been commuted, violates the Ex Post Facto clause.

III. Thomas's Due Process Claim

Thomas argues that the Board's handling of his application without any real consideration of its merits, in violation of the Board's own procedures, offends due process, and that this court should itself order him released. Although the Board has not given due consideration to the relevant factors, this can be explained by its misguided reliance on the post-1996 criteria. Moreover, we are exceedingly reluctant to usurp the Board's functions and, except in our review capacity, substitute our own judgment for that of the parole Board. Although there were flaws and oversights in the Board's consideration of Thomas's applications, we are not entirely convinced that the Board is unable to give Thomas a fair hearing in light of the important considerations we have set forth in this opinion.

IV. Conclusion

Ordinarily, the Board's decision to parole or deny parole to a prisoner is based on the consideration of many factors, with no one factor being dispositive. We expect that, on remand, the Board will not be defensive, but instead will fairly consider Thomas's application in the light of our observations and Ex Post Facto prohibitions. If the Guidelines recommend release, the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release.

In conclusion, the Order of the District Court is hereby affirmed, with directions to remand the matter to the Board for further proceedings consistent with this opinion, including a new hearing for Thomas and the

Board's written decision thereon within 45 days after the mandate of this court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS, Plaintiff	:	CIVIL ACTION
	:	No. 99-6161
v.	:	
DONALD VAUGHN, et al., Defendants	:	

MEMORANDUM

BUCKWALTER, J. March 15, 2002

I. STATEMENT OF THE CASE

On September 29, 1964, the body of twelve-year old Edith Connor was found in a narrow alley behind petitioner's shoe repair shop on 40th Street in Philadelphia. The properties along 40th Street had rear wooden fences with a door leading from the back yard into the three-foot wide alley. In the opinion of the Pennsylvania Supreme Court (*Commonwealth v. Thomas*, 448 Pa. 42, 292 A.2d 352 (1972)), the following narrative appeared:

> The police arrived, pronounced the girl dead at the scene and removed the body to the morgue. The body was then examined by one Dr. Edward Campbell, Medical Examiner and Forensic pathologist. The deceased's blouse had been torn and the zipper of her dungarees (men's style) was partially ripped off. The dungarees were also torn at the inner seams of the

thighs on both sides of the crotch. The crotch seam of the deceased's panties was likewise torn. The cause of death was attributed to strangulation by ligature. There were also bruises to the skin of the neck, a broken bone on the right side of the neck and bruises of the voice box. Tears were found in the child's rectum and testing ascertained the presence of acid phosphates in the vagina.

The clothing of the deceased was delivered to the Police Department Laboratory where brushings and microscopic examination disclosed particles of leather, leather dust, glue, polish, dog hairs, fiber and chips of paint adhering to the clothing. These findings led to the issuance of three search warrants for the person of and premises occupied by the appellant, which premises were located at 1109 North 40th Street and consisted of a shoe repair shop in the ground floor and living quarters in the rear of the shop. The execution of these warrants resulted in obtaining, *inter alia*, paint scrapings from various parts of the premises, specimens of leather, glue, fibers, threads and hairs, clothing of appellant, bed sheets, bedspreads and drapes. These specimens were delivered to the Police Department Laboratory, analyzed by Dr. Edward J. Burke, then the Laboratory Director, and compared with items removed from the deceased's clothing. The Commonwealth's entire case rested upon the testimony of Dr. Burke with reference to the similarity of the specimens.

Petitioner was convicted by a jury of first-degree murder of Edith Connor. He was sentenced to life imprisonment by Judge Joseph L. McGlynn, Jr. on April 23, 1971. The sentence was affirmed by the Supreme Court of Pennsylvania, *supra*.

His subsequent *pro se* petition for post conviction relief on a single technical ground that the indictment did not use the words "kill and murder" was denied. *Commonwealth v. Thomas*, Pa.Super. 408 A.2d 1148 (1979).

In 1973, a federal petition for habeas corpus was dismissed without prejudice for failure to exhaust state remedies (E.D. Pa. C.A. No. 73-2711).

In 1993, petitioner filed an application with the Pennsylvania Board of Pardons.[1] The four members of the

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[1]Article 4, § 9 of the Pennsylvania Constitution provides:

(a) In all criminal cases except impeachment, the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

(b) The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of two-thirds or a majority of the members elected to the Senate as is specified by law for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania and shall be recognized leaders in their fields; one shall be a member of the bar; one a penologist, and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

Amended May 16, 1967; May 20, 1975.

Board of Pardons, Attorney General Ernest Preate, Jr., Dr. Daniel J. Menniti, Warden Thomas Frame, and Ronald J. Harper, Esq., who heard the case (then Lieutenant Governor Mark Singel did not hear the oral presentation), recommended unanimously that the life sentence of petitioner, which was computed from October 15, 1964, the day after petitioner's arrest, be commuted from life imprisonment to a term of imprisonment of thirty-one (31) years, nine (9) months, six (6) days to life expiring on July 21, 1996, and if he be released on parole in accordance with law he shall remain on parole the balance of his life unless returned to prison for violation of his parole.

The Board of Pardons added the following:

Mr. Thomas has served over twenty-nine years of his sentence. He has had only five misconducts since 1971. He has continued to maintain his innocence throughout his incarceration. He earned a Bachelor of Arts Degree from Villanova in 1992. He completed sex therapy and continues involvement with Alcoholics Anonymous. Since 1987, he has worked in the Weave Shop and has displayed excellent work habits. The Staff, Superintendent and Commissioner all support commutation due to the applicant's maturity and stability.

The members of the Board of Pardons were impressed by the strong community support for this application. Over two dozen individuals attended the clemency hearing on behalf of Mr. Thomas. We are confident that he will have the necessary support to guide him from the structured environment of prison to productive living in society. We suggest a two year post-dated minimum sentence date of July 21, 1996. This will enable him the opportunity to take full advantage of pre-release programs offered by the

Department of Corrections. At the expiration of his minimum sentence, he will have served nearly 32 years incarcerated.

On January 14, 1995, Governor Robert Casey granted commutation as follows:

> Therefore, Know Ye, That in consideration of the promises and by virtue of the authority vested in me by the Constitution, I have commuted the sentence of life imprisonment of the said Louis C. Mickens-Thomas from life imprisonment to the minimum term of 31 years, 9 months, 6 days to life expiring on July 21, 1996, so that if he be released on parole in accordance with law he shall remain on parole the balance of his natural life unless returned to the correctional institution for violation of parole and that the sentence of imprisonment is hereby commuted accordingly so that he may be eligible for pre-release consideration at the discretion of the Dept. of Corrections. Subsequent to the date of my signature below a conviction of a new summary, misdemeanor or felony offense may upon a hearing by the Board of Pardons render my granting of this clemency null and void.

As set forth above, petitioner did not become eligible for parole until July 21, 1996. In July of 1995, after his commutation but before the expiration of his prison term, an act duly passed by the legislators and applicable to the Pennsylvania Board of Probation and Parole (hereafter the Board) provided in part as follows:

> In no case shall the board act upon an application of an inmate whose term of imprisonment was commuted from life to life on parole or upon an inmate who was serving a term of imprisonment for a crime of violence or is an inmate serving a sentence

under 42 Pa.C.S. § 9712 (relating to sentences for offenses committed with firearms) unless the inmate has served at least one year in a pre-release center.

61 P.S. § 331.34a.

The Department of Corrections did not approve petitioner for pre-release (Letter of June 6, 1995 - P-21). On July 22, 1996, petitioner filed an application for release but the Parole Board notified him that it could not act upon his application since he had not completed one year in pre-release, citing 61 P.S. § 331.34a (*See* Respondent Exhibit 9 at 217, Letter to Leonard Sosnov, Esquire dated September 25, 1996).

On November 26, 1996, petitioner filed a petition for review in the nature of an action in mandamus invoking the original jurisdiction of the Commonwealth Court of Pennsylvania. *See Mickens-Thomas v. Com.*, — Pa.Cmwlth. —, 699 A.2d 792 (1997). In that case, the Pennsylvania Board of Probation and Parole conceded that 61 P.S. § 331.34a could not be applied retroactively to petitioner. While petitioner was seeking an order compelling the Board to parole him, the Commonwealth Court denied that relief. Instead, it directed the Board by order dated 8/12/97 to "consider and rule on Petitioner's application for parole within ten days of the entry of this order and, in the event of denial of the application, transmit a written statement of the reasons for the denial to the Pennsylvania Board of Pardons for its consideration of whether to accept the denial or immediately release petitioner on parole." Petitioner's November 12, 1997 notice of appeal from this judgment was quashed by the Pennsylvania Supreme Court on 1/15/98.

Pursuant to the directive of the Commonwealth Court, the Board considered petitioner's application for parole

on August 21, 1997 and denied it. The Board asked for an evaluation by mental health staff experienced in dealing with sex offenders and scheduled another review for March of 1998. Also pursuant to the Commonwealth Court's order, the Board transmitted a written statement of its reason as follows: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Unfavorable recommendation from the District Attorney. Conviction of prior assault offense." With regard to the latter, stipulation number 2, *see infra*, reads: "In 1945, Mr. Thomas was charged with rape when he was 17 years old. The rape charge was dismissed and a wayward minor charge was substituted. A wayward minor charge is not an adult conviction but a juvenile adjudication, for which Mr. Thomas was placed on probation."

On September 18, 1997, the Pardon Board by a vote of 3-2 concurred in the Board's action denying parole. The Pardon Board at this time was composed of Lieutenant Governor Mark Schweiker, Attorney General Michael Fisher, Warden Richard Gigliotti, Dr. Daniel Menniti and Thomas Harper, Esquire (*See* Stipulations, No. 4).

On October 29, 1997, petitioner filed an application for leave to file original process with the Pennsylvania Supreme Court, along with a petition for writ of habeas corpus seeking his immediate release from prison. In a *per curiam* order entered January 28, 1998, the court allowed petitioner to file original process and summarily denied the habeas petition. *See Mickens-Thomas v. Vaughn*, No. 158 E.D. Misc. Docket 1997.

On March 30, 1998, the Board again denied petitioner's request for parole. The reasons given were: "Assaultive instant offense. Very high assaultive behavior potential. Victim injury. Your need for counseling and treatment." (Respondent's Exhibit 9 at 28). This action

was taken even though petitioner was in full compliance with the Board's stipulations from the August 1997 hearing and had "full staff support" of the Department of Corrections.

A Review Summarization Report showed that petitioner had complied with the Board's stipulation under the August 21, 1997 order. Petitioner remained free of misconducts, was recommended for release by the Department of Corrections and was in full compliance with the treatment programs. (*See* P-5 (c)(e)).

Once again the Board scheduled another review for during or after March 2000. It forwarded the reasons for its decision to the Pardons Board which on April 21, 1998 concurred with the decision of the Board. (Respondent's Exhibit 10 at 232).

Petitioner filed the petition now before the court on December 6, 1999. While this litigation was pending, the Board, on March 9, 2000, once again denied parole and scheduled review for March of 2002. The following written stipulation has been entered into by the parties:

Stipulations

Both parties reserve the right to argue that the following information is irrelevant and should not be considered by the Court. Should the Court ultimately decide that the information is relevant and admissible, the parties stipulate that the following facts are true:

1. Mr. Thomas has not had any misconducts since 1990 but has incurred all of the misconducts listed on Exhibit R-1.

2. In 1945, Mr. Thomas was charged with rape when he was 17 years old. The rape charge was dismissed and a wayward minor charge substituted. A wayward minor charge is not an adult conviction but is a juvenile adjudication, for which Mr. Thomas was placed on probation.

3. Records have been located for 287 inmates whose life sentences were commuted between 1942 and the present. More than 287 life sentences were commuted during that time period, but their records could not be located by either the Board of Pardons or the Board of Probation and Parole. In each case of these 287 cases, the Governor commuted the inmate's minimum sentence from life in prison to a specified term of years, establishing a specific date on which that inmate would be eligible for parole. The records also indicate when 266 of those 287 cases were granted parole - 259 were granted parole on their first application; seven were denied parole on their first application but subsequently granted parole. For those seven inmates, the parties stipulate to the information attached as Exhibits R2 through R8. Of the 266 inmates whose release dates are known, 228 were paroled between 1971 and 1995.

4. From January 1, 1997 until today, 63 life prisoners filed a total of 73 commutation applications with the Board of Pardons. The Board voted not to hold a public hearing on 69 of those applications; the Board granted a hearing on the remaining four applications. Three of those public hearings have already been held, and the Board ultimately voted not to recommend commutation. The fourth public hearing has yet to be scheduled.

When the Board of Pardons concurred in the Parole Board's decisions not to release Mr. Thomas in

September 1997 and March 1998, the Board of Pardons was comprised of Lt. Governor Mark Schweiker, Attorney General Michael Fisher, Dr. Daniel Menniti, Warden Richard Gigliotti, and Thomas Harper, Esquire. On both occasions, Schweiker, Fisher and Gigliotti voted to concur with the Parole Board's decision, whereas Mr. Harper and Dr. Menniti voted against concurrence.

During their tenure on the Board of Pardons, Lt. Governor Schweiker and Warden Gigliotti never voted in favor of recommending commutation of a life sentence. As of today, Attorney General Fisher has not yet voted in favor of recommending commutation of a life sentence; however, he voted in favor of holding a public hearing on three commutation cases, one of which has not yet been heard by the Board. Likewise, during his tenure, Warden Gigliotti did not vote in favor of recommending commutation of a life sentence. However, Warden Gigliotti did vote in favor of a public hearing in one commutation case.

5. The parties waive all objections, except for relevance to the admission of the documents listed on the attached list prepared by the plaintiff. (Exhibits 1-25).

6. Each time the Board of Probation and Parole refused to parole Mr. Thomas, the decision makers all had access to the Parole Board's entire file, docketed as 5308-H. Any document that was reviewed or considered by the Board is contained in that file. The parties waive all objections, except for relevance, to the admission of a complete copy of that file as redacted during discovery to replace identifying information with a generic description of the provider of the information (e.g. counselor, victim, etc.) (Exhibit R9).

7. Each time the Board of Pardons concurred in the Board of Probation and Parole's refusal to grant parole, every member of the Board of Pardons had access to the Board's entire file, docketed as B-427 Session July 1994. Any document that was reviewed or considered by the Board is contained in that file. The parties waive all objections, except for relevance, to the admission of that file as provided in discovery. (Exhibit R10).

8. The parties waive all objections, except for relevance, to the admission of an affidavit, dated December 12, 2001, by Nelson R. Zullinger, and its attachments. (Exhibit R11, Exhibit 11A and Exhibit 11B).

9. The parties waive all objections, except for relevance, to the admission of respondents' chart entitled "Life Prisoners Released by Commutation Compared with the Total Population of Life Prisoners (1971 through 2001)." (Exhibit R12).

10. The parties waive all objections, except for relevance to admission of documentation explaining the sexual offender treatment provided by the Joseph J. Peters Institute at the State Correctional Institute at Graterford. (Exhibit R13).

II. STANDARD OF REVIEW

Initially, the court agrees with the petitioner's argument with regard to exhaustion of remedies as stated in its opinion of September 29, 2000. Accordingly its review of the constitutional claims is *de novo.*

Petitioner argues that the retroactive application of changes in rules, guidelines, policies or statutes

governing a discretionary parole scheme may violate the *ex post facto* clause. As parole in Pennsylvania is governed by statutes, regulations and internal memoranda and guidelines, it follows that *ex post facto* principles are fully applicable. *Citing Coady v. Vaughn*, 251 F.3d 480 (3d Cir. 2001), petitioner argues that as stated therein:

> [T]wo critical elements must be present before a court may find that criminal or penal law violates the *ex post facto* clause: (1) the law must be retrospective, applying to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. *Id.*

Thus, petitioner argues, since the Board has retrospectively applied statutory, rule and policy changes to him, the dispositive question is whether he has been disadvantaged by the application of changes in law.

Although the above summary is somewhat oversimplified, petitioner's statement of the law is substantially correct. As an initial matter, then, the court must determine what, if any, statutory law, rule and/or policy changes have retrospectively been applied to petitioner.

The Pennsylvania Probation and Parole Act of 1941 established the following policy:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and

> efficient parole administration and to the end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth. 1941, Aug. 6, P.L. 861, Section 1.

Petitioner then cites several Pennsylvania appellate court cases standing for or at least supporting the petitioner's contention that release on parole and rehabilitation under the Pennsylvania Probation and Parole Act was viewed as consistent with the statutory goal of protection of society. Indeed, the petitioner points to the following conclusion appearing in the 1991 50th Annual Report of the Board:

> The Board and its staff recognize that ex-offenders can change if given the proper opportunities with dignity and respect. Conditional release on parole provides the offender with the opportunity for change which simultaneously enables the Board to meet its primary goal of the protection of society. It is through these efforts, and the willingness of the client to use these opportunities in a constructive way, that the real mission of the agency is accomplished. P-12.

The sentencing system in Pennsylvania permits the trial judge to determine when a defendant may be released from prison by the imposition of a minimum and maximum sentence. A defendant may apply for parole at the expiration of his minimum sentence. Petitioner references a 1989 Manual of Operating Procedure in which the Board states at 2.2 thereof: "The Board's intentions are not to circumvent the authority of the sentencing court and feel that an individual should be given every consideration for parole at the expiration of the minimum sentence."

In the 1991 50th Annual Report previously referred to, it was reported that about 80% of inmates are granted

parole at the initial review. (Petitioner Exhibit 12 at 6). By the first quarter of 1996, the release date on prisoner's minimum date dropped from 80% to 29%. *See Commonwealth v. Stark*, 698 A.2d 1327, 1332 (Pa.Super. 1997).

Significantly, an amendment to the Probation and Parole Act in December of 1996 amended the public policy as to parole which now reads as follows:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> *In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public.* In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Reflecting this amendment, the Board in its 1995-1997 report stated in its Mission Statement:

> *The Pennsylvania Board of Probation and Parole is committed to protecting the safety of the public,* addressing the needs of crime victims; improving county adult probation and parole services, and assisting in the fair administration of justice by ensuring the custody, control and treatment of offenders under the jurisdiction of the Board.

It seems clear that the Board has adopted the policy change made in the 1996 amendment. In this regard, a

recent case from the Commonwealth Court of Pennsylvania contained the following:

> To further support its argument, the Board offered that even though Voss has not been paroled, the current public policy requires the Board to seek first and foremost to protect the safety of the public. While acknowledging that the public policy as to parole changed in 1996 from a client-centered policy emphasizing rehabilitation to one that emphasizes public safety, deterrence of crime and the incapacitation of criminals, the Board argues that the Section 19 standards by which an offender is reviewed have not changed and that it employed those standards in denying Voss' parole application.

Voss v. Pennsylvania Board of Probation and Parole, 2001 WL 1584398 (Pa.Cmwlth. Dec. 12, 2001).

The statistical data from the state's records presented by petitioner tends to show that violent offenders now may face a significant likelihood of serving more time in prison and thus have been disadvantaged by the change in the law in 1996.[2]

---

[2]The court has reviewed the exhibits which support the following statement in petitioner's brief:

> Under the amended statute, the Parole Board has treated violent offenders far more restrictively and has routinely held these inmates past their minimum parole eligibility dates. In 1997, 59% of the applications for parole of non-violent offenders were granted, but only 31% of violent offenders received parole. *See* P-8 at 0002538. During the week of March 19, 1998 (when petitioner was considered for parole) only 24% of violent offender parole applications were granted, while 62% of non-violent offenders received parole. *See* P-7 at 0002466. (For the entire year, 1998, 56%

(continued...)

In the *Voss* case cited above, the Board argued that the Section 19 standards by which an offender is reviewed have not changed from the 1941 Act (which is substantially correct although some changes not pertinent to this argument were made). *See* 61 P.S. 331.21(a).

However, under the jurisprudence of this circuit (*see Coady, supra*) and the Supreme Court (*Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362 (2000)), if petitioner demonstrates by evidence drawn from the state's record that a rule's practical application, retrospectively, by the agency charged with exercising discretion will result in a longer period of incarceration than under the earlier rule, the *ex post* clause is violated.

The state correctly points out that petitioner's claim has to be more than mere speculation. That is to say, there must be clear knowledge that the retroactive application of the rule increases, to a significant degree, the likelihood or probability of prolonging petitioner's incarceration.

---

[2](...continued)
of non-violent offender parole applications were granted, while only 31% of violent offenders were paroled. P-9 at 0001647). Prior to these changes in law and policy with respect to violent offenders, upwards 80% of all offenders were granted parole. *See supra*, at 11. *See also Commonwealth v. Stark*, 698 A.2d 1327, 1332 (Pa. Super. 1997) ("the release date on prisoner's minimum date dropped from 80% in the years from 1992-1993 to 29% in the first quarter of 1996). Where a minimum sentence is viewed as too lenient, it is now considered a negative factor for parole. *See* P-24(a), "Truth-In-Sentencing Eligibility," at 9 (unnumbered).

The statistical evidence of offenders charged with crimes of violence who are now less likely to get paroled may not be sufficiently complete as the state argues to prove that the retroactive application of any new law, rule or guideline of the Board has increased to a significant degree the likelihood of prolonging a prisoner's incarceration.

But those statistics cited by petitioner coupled with the stipulations 3 and 4 in this case and the history of petitioner's unsuccessful application in March of 1998, despite having seemingly complied with all prerequisites for parole, demonstrate that the agencies responsible for exercising discretion have retroactively applied the 1996 policy provision to petitioner, and this has increased to a significant degree the likelihood that petitioner will be in jail longer than if the pre-1996 policy would have been followed. It does not follow that petitioner should now be released. I agree with the state that what petitioner is entitled to have is that the Parole Board consider his application under the pre-1996 law.

Petitioner has also raised the argument that he was denied due process rights.

First, petitioner states that since he had a reasonable and objective expectation of release on parole, he had a liberty interest in parole which was violated by the parole refusal of March 19, 1998. However, this is not the case in Pennsylvania where parole is merely a possibility, an act which lies solely in the discretion of the Board. Like the case which petitioner cites in support of his argument, *Greenholtz v. Nebraska Penal Inmates*, 422 U.S. 1 (1979), the language and structure of Pennsylvania's Probation and Parole Act provides a mechanism for parole that is entitled to some constitutional protection. Petitioner has not pointed out

how that mechanism is constitutionally defective other than his parole was refused. That clearly is not sufficient.

Petitioner makes a more thorough and detailed argument that he was denied substantive due process in that the refusal to parole him was arbitrary, capricious and fundamentally unfair. The thrust of petitioner's argument can be summarized from his brief at page 26:

> Pennsylvania law required the Parole Board to grant parole unless it had concluded that petitioner was not rehabilitated and suitable for release into society. As we have demonstrated, the Pennsylvania statutory scheme did not permit a denial of parole based solely on the nature of the crime or the defendant's pre-offense behavior. Thus, as in *Greenholtz*, 442 U.S. at 10, the Pennsylvania statutory scheme involves a "discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he had done." The Parole Board has "the fact-finding duty of determining in each case when the conditions prescribed by the legislature for provisional release from confinement have been complied with . . ." *Commonwealth ex rel. Banks v. Cain*, 28 A.2d 897, 901 (Pa. 1942).
>
> In this case, the statutory mandate was completely ignored by the Parole Board. The Board's publicly stated reasons may appear rational, but, as we have demonstrated, the reasons were boilerplate, based solely on the offense committed over 33 years earlier.

The petitioner's contention is flawed, however.

Stipulation 6 provides that each time the Board refused parole to petitioner, the decision maker had access to the Board's entire file and that any document

reviewed or considered by the Board is contained in that file marked as Exhibit R9.

I have reviewed that entire file and it does not support petitioner's argument that his denial of March 1998 (which is what he is contending) was based solely on the offense committed over 33 years earlier. Other factors as pointed out by respondent in its brief could have been considered by the Board to support its stated reason of "very high assaultive behavior potential." For example, the report found at P-5(f) states:

> PSYCHOLOGICAL REPORT: A 3-8-96 psychology evaluation describes an antisocial personality of superior intellect with a history of alcoholism. Testing indicates evidence of possible sexual preoccupation and psychosexual immaturity. Stability score is 2.

This court cannot substitute its judgment for the Board's even where as here the Board's decision is arguably contrary to the weight of the evidence in favor of parole. It's decision is not without any rational support in the record and thus petitioner's claim of denial of substantive due process falls short.

Having found an *ex post facto* violation, petitioner is entitled to relief. Both sides agree that a remand for a further hearing before the Parole Board under appropriate standards is the normal relief. Petitioner argues that where the Board intentionally evaded a court mandate or acted in bad faith, the court may order immediate release. Here, the Board has neither intentionally evaded a court mandate nor acted in bad faith.

An order follows.

ORDER

AND NOW, this 15th day of March, 2002, the petitioner's writ of habeas corpus is GRANTED to the extent that the case is REMANDED for a further hearing before the Pennsylvania Board of Probation and Parole to be held within thirty (30) days under the standards that existed prior to the enactment of the amendment to the Probation and Parole Act codified at 61 P.S. § 331.1.

BY THE COURT:

RONALD L. BUCKWALTER, J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-2047 & 02-2213

LOUIS MICKENS-THOMAS
Appellant in No. 02-2213

v.

DONALD VAUGHN, SUPERINTENDENT;
PENNSYLVANIA BOARD OF PROBATION AND PAROLE;
THE PENNSYLVANIA BOARD OF PARDONS; THE
ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA

Pennsylvania Board of Probation and Parole
Appellant in No. 02-2047

Appeal from the United States District Court for the
Eastern District of Pennsylvania
D.C. No.: 99-cv-06161
District Judge: Honorable Ronald L. Buckwalter

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH and ROSENN,* *Circuit Judges*.

(Filed Mar 24 2003)

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*Honorable Max Rosenn, Senior Circuit Judge, was a member of the original panel and voted as to panel rehearing only.

SUR PETITION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant/Appellee Pennsylvania Board of Probation and Parole having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Max Rosenn
Circuit Judge

Dated: 03/24/03

[Exhibit P-13]

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE
Fiscal Years 1993-95 Biennial Report

* * * * *

TABLE 3
TOTAL INMATES CONSIDERED FOR PAROLE OVER FIVE FISCAL YEARS

Fiscal Year	Parole Considerations	Paroles Granted	Percent Granted
1990-91	8,954	6,890	77%
1991-92	8,949	6,912	77%
1992-93	9,932	7,652	77%
1993-94	10,613	7,678	72%
1994-95	9,645	6,129	64%

[Exhibit P-14]

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE
Fiscal Years 1995-97 Biennial Report

* * * * *

TABLE 3
TOTAL INMATES CONSIDERED FOR PAROLE OVER FIVE FISCAL YEARS

Fiscal Year	Parole Considerations	Paroles Granted	Percent Granted

1992-93	9,932	7,652	77%
1993-94	10,613	7,678	72%
1994-95	9,645	6,129	64%
1995-96	10,302	3,946	38%
1996-97	15,966	6,778	42%

[Exhibit P-15]

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

PAROLE DECISION MAKING GUIDELINES

A Statement on Policy, Procedure and Philosophy

Policy is expected to reflect decision making practice in approximately eighty percent of the decisions rendered.

* * * * *

Since the parole guidelines prescribes a decision based on the accumulation of evidence against parole, the decision maker must decide whether he concurs with policy, or wishes to make an exception to policy, using the final decision making table on page 4.

* * * * *

Thus, although discretion is structured in the decision making guideline format, the decision maker must still make their own judgments on individual cases. This feature of decision making guidelines underscores the reality that the structuring of discretion does not eliminate it; the burden of the decision remains with the decision maker to evaluate the merit of each case.

* * * * *

These guidelines have been revised four times since inception as explicit policy for decision making. In this way, policy remains adaptable and relevant to changing conditions.

[Exhibit P-16]

PAROLE DECISION MAKING GUIDELINES
A SPECIAL REPORT
Prepared for
the
HOUSE JUDICIARY COMMITTEE

PENNSYLVANIA BOARD OF PROBATION AND PAROLE

FRED W. JACOBS
CHAIRMAN

By
Management Information Division
James Alibrio, Director
George Sullivan, Research

May 16, 1991

* * * * *

The Board's decision making guidelines allow for decisions outside the guideline recommendation. Recent guideline decisions have been found to have a 79% conformity rate. Some 21% of the decisions are outside the guidelines. These decisions require written explanation to justify the policy exception. In some instances, the incidence of known characteristics are too few in number to make a measurable statistical difference in the development a guideline criterion. Consequently, they may be excluded from the guideline not because they are unimportant, but due to their relative rarity .

This underscores another important aspect of guidelines: they can not account for everything, but only those factors which are generally prevalent in the population in need of classification. The decision makers, armed with expertise on exceptions, consider objectively unique but consequential characteristics which come before them. It is this aspect of decision making that justifies the need for clinical assessment and decisions which deviate from guideline assessed norms.

* * * * *

The Parole Prognosis Assessment if a statement on the probabilities of failure for each group; they determine the expected rate of failure but do not decide which offender will fail or succeed. ... The Parole Prognosis Assessment is intended to guide the decision maker but not dictate the decision.

9. How have the PBB's guidelines been validated? What "academic" or "rigorous" studies have been conducted since their inception to validate their accuracy and appropriateness?

The Board's Parole Decision Making Guideline is an active policy instrument which receives continual review and reassessment to keep it current with changing priorities and new conditions. The objective of an ongoing program of research and development is to insure that the guidelines are an accurate reflection of policy in practice....

* * * * *

13. What is the rate of guidelines overrides, that is, cases in which the Board overrides the guidelines score bases on "subjective" review of the case? ...

There have been two studies conducted which address the matter of override rate. The first was completed in May 1985....

* * * * *

Overall, there were 378 out of 1,657 or 23% who were overrides or whose actual decision was contrary to the guidelines recommendation; and 77% who were within the guidelines. ...

The most recent study of guidelines-decision consistency was published in June 1989....

* * * * *

The overall guidelines override rate was 317 cases out of 1,504 or 21%. The corresponding guidelines conformity rate was 79%.

Supreme Court, U.S.
FILED

03 -47 JUL 18 2003

No. _____

In the Supreme Court of the United States

FRANK D. GILLIS, ET AL.,
Petitioners

v.

JOHN HOLLWELL, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JOHN G. KNORR, III
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN HOLLAWELL,	: CIVIL NO. 4:CV-00-1222
	:
Petitioner	: (Judge Muir)
v.	:
	: (Magistrate Judge Smyser)
FRANK D. GILLIS and	:
WILLIAM WARD,	:
Pennsylvania Board of	:
Probation and Parole,	:
	:
Respondents	:

REPORT AND RECOMMENDATION

On July 10, 2000, the petitioner, a state prisoner proceeding *pro se,* filed a petition for a writ of habeas corpus. Hollawell was convicted in the Court of Common Pleas of Philadelphia County in June of 1989 and in April of 1990 of offenses involving corrupt organization and bribery. He received prison sentences of, respectively, five to twenty years and eighteen months to thirty-six months. He became eligible for parole on November 2, 1994. His maximum release date is May 2, 2011. The Pennsylvania Board of Probation and Parole has refused his application for release on parole. The petitioner is not attacking his conviction. The petitioner claims that the Pennsyvlania Board of Probation and Parole's July 21, 1999 denial of parole was in violation of the Ex Post Facto Clause of the United States Constitution. The petitioner is seeking an order directing his release from custody on parole.

By an Order dated July 17, 2000, the respondents were ordered to show cause on or before August 7, 2000

why the petitioner should not be granted habeas corpus relief. The Order of July 17, 2000, provided that the petitioner may file a reply to the response to the show cause order within ten days of the filing of the response.

On July 31, 2000, the petitioner filed a motion seeking permission to obtain discovery and a brief in support of that motion.

On August 1, 2000, the respondents filed a document entitled "Respondents' Motion to Dismiss" and a brief in support of that motion. The respondents stated that the petitioner had filed a prior petition for a writ of habeas corpus — *Hollawell v. Gillis,* No. 4:99-CV-1502 (M.D. Pa.) — challenging the denial of his parole in which he raised numerous claims but no ex post facto claim, that that prior petition was denied by this court and is on appeal to the United States Court of Appeals for the Third Circuit, and that, therefore, the instant petition should be dismissed as a second or successive petition pursuant to 28 U.S.C. § 2244(b).

On August 11, 2000, the petitioner filed a document entitled "Plaintiff's Motion to Dismiss Respondents' Motion to Dismiss" and a brief in support of that motion. The petitioner argued, *inter alia*, that the instant petition is not a second or successive petition because his prior petition challenged a prior denial of parole and not the July 21, 1999 denial of parole.

By an Order dated August 24, 2000, the respondents were granted an extension of time to file a response to the petitioner's motion for discovery. The respondents were ordered to file their response to the motion for discovery within ten days after the court rules on their motion to dismiss.

On the basis of the assertion by the petitioner that his prior petition challenged a different denial of parole than is at issue in the instant case, we concluded that the instant petition has not been shown to be a second or successive petition and by an Order dated September 28, 2000 we denied the respondents' motion to dismiss. The Order of September 28, 2000 ordered the respondents to show cause within fifteen days why the petitioner should not be granted habeas corpus relief and provided that the petitioner may file a reply to the response within ten days after the response is filed.

On October 10, 2000, the petitioner filed a motion for a default judgment and a brief in support of that motion.

On October 10, 2000, the respondents filed a brief in opposition to the petitioner's motion seeking discovery. On October 12, 2000, the respondents filed an answer to the petition.

On October 23, 2000, the petitioner filed a reply to the respondents' answer to his petition. Also, On October 23, 2000, the petitioner filed a reply brief in support of his motion seeking discovery.

By a separate Order issued this date, we denied the petitioner's motion for discovery and motion for a default judgment.

The respondents contend that the petition should be dismissed because the petitioner has not exhausted available state remedies.

A state prisoner must exhaust available state remedies before filing a petition for habeas corpus in federal court. 28 U.S.C. § 2254(b) and (c). This requirement serves the interests of comity between the federal and state systems by allowing the state an initial

opportunity to determine and correct any violations of a prisoner's federal rights. *O'Sullivan v. Burchell*, 119 S.C. 1728, 1732 (1999) ("Comity ... dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.").

A habeas corpus petitioner bears the burden of demonstrating that he has exhausted state remedies. *O'Halloran v. Ryan*, 835 F.2d 506, 508 (3d Cir. 1987). In order to exhaust state remedies for federal habeas corpus purposes, a petitioner must show that he has fairly presented his claim to the state courts. *Picard v. Connor*, 404 U.S. 270, 278 (1971). To be fairly presented to the state courts both the legal theory and the facts supporting the claim must have been presented to the state courts. *O'Halloran, supra,* 835 F.2d at 508. Further, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan, supra*, 119 S.Ct. at 1732.

Despite the exhaustion requirement, an application for a writ of habeas corpus may be denied on the merits notwithstanding the failure of the petitioner to exhaust state remedies. 28 U.S.C. § 2254(b)(2).

There is some question about whether a Pennsylvania prisoner challenging the denial of parole on constitutional grounds has any available state remedies.

In *Reider v. Pennsylvania Bd. Of Probation & Parole*, 514 A.2d 967, 971 (Pa. Commw. Ct. 1986), the Pennsylvania Commonwealth Court held that under Pennsylvania law a prisoner has no constitutionally protected liberty interest in parole and that, therefore, a

denial of parole may not be judicially reviewed in Pennsylvania. After *Reider*, other panels of the Commonwealth Court followed its holding. *See e.g. Shaw v. Pennsylvania Bd. Of Probation & Parole*, 671 A.2d 290, 292 (Pa. Commw. Ct. 1996) (due process and equal protection claims in connection with denial of parole unreviewable); *King v. Pennsylvania Bd. Of Probation & Parole*, 534 A.2d 150, 151 (Pa. Commw. Ct. 1987)(retaliatory denial or parole not reviewable). Other panels, however, seemed to retreat somewhat from *Reider's* holding. *See e.g. Murgerson v. Pennsylvania Bd. Of Probation & Parole*, 579 A.2d 1335, 1336 n.2 (Pa. Commw. Ct. 1990)(commenting that imposition of parole condition not subject to judicial review absent an allegation that the condition violates a prisoner's constitutional rights); *McCaskill v. Pennsylvania Bd. Of Probation & Parole*, 631 A.2d 1092, 1094 n.2 (Pa. Commw. Ct. 1993)(stating that judicial review of Parole Board's order includes determination of whether constitutional rights were violated).

In *Burkett v. Love*, 89 F.3d 135 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would hold that the Commonwealth Court of Pennsylvania has jurisdiction over appeals from denials of parole based on constitutional grounds. The *Burkett* court also stated that even if the Commonwealth Court does not have jurisdiction over direct appeals, a prisoner may still file either a petition for a writ of habeas corpus or a petition for a writ of mandamus in the state courts. Thus, according to *Burkett* a prisoner has three potential ways of attacking a denial of parole in Pennsylvania — appeal, mandamus, or habeas corpus. *Id.* at 142. Although the *Burkett* court held that a prisoner in Pennsylvania challenging the denial of parole on constitutional grounds has state remedies available, it recognized that

Pennsylvania law was unsettled and stated that "a ruling by the state Supreme Court or Commonwealth Court discussing the scope of the *Reider* opinion and the proper channels for bringing such claims would be helpful in the this frequently litigated area of state law." *Id.* at 142.

After the *Burkett* opinion, both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court addressed the proper channels for the Pennsylvania prisoner to bring a constitutional challenge to a denial of parole.

In *Weaver v. Pennsylvania Bd. of Probation & Parole*, 688 A.2d 766 (Pa. Commw. Ct. 1997), the Commonwealth Court of Pennsylvania rejected the holding and reasoning of *Burkett*. The *Weaver* court stated that the Commonwealth Court does not have jurisdiction over appeals of denials of parole and that state habeas corpus is also not available to challenge a decision of the Board denying parole. 688 A.2d at 775. But see, *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Commw. Ct. 1998) ("decisions to grant or deny parole are generally not appealable except to the extent that a constitutional or statutory violation has occurred."). The *Weaver* court held that a parole eligibility decision may be challenged by way of a petition for a writ of mandamus, but that such a petition would only be granted where "the Board's refusal to grant parole, as evident solely in its decision, was, as a matter of law, based upon an erroneous conclusion that it had the discretion to deny parole for the reason given." *Id.* at 777.

In *Rogers v. Pennsylvania Bd. Of Probation & Parole*, 724 A.2d 319 (Pa. 1999), prisoners claimed that the denial of parole by the Board was arbitrary and capricious. The Pennsylvania Supreme Court held that "the courts of the Commonwealth do not have statutory jurisdiction to conduct appellate review of a decision of

the Board, since such a decision does not constitute an adjudication." *Id.* at 322. The *Rogers* court did note, however, that while prisoners "are not entitled to appellate review of a Parole Board decision, they may be entitled to pursue allegations of constitutional violations against the Parole Board through a writ of mandamus, or through an action under 42 U.S.C. § 1983." *Id.* At 323 n.5.

The state case law since *Burkett* has not definitively answered the question of what, if any, review of constitutional claims in the parole denial context Pennsylvania courts will entertain.[1] However, based on the state case law since *Burkett*, it appears that "the Pennsylvania courts provide a single avenue of relief to prisoners claiming their parol denials were unconstitutional: a mandamus action in the

---

[1]On August 25, 1999, the United States Court of Appeals of the Third Circuit certified the following questions of law to the Pennsylvania Supreme Court: "1. May a person who has been denied parole from a Pennsylvania sentence obtain review from a Pennsylvania state court of a claim that the denial of parole violated the Ex Post Facto Clause of the United States Constitution? 2. If so, may review be secured on direct appeal, through a petition for a writ of mandamus, or in some other manner?." *Coady v. Vaughn*, 98-1311, slip order (3d Cir. Aug. 25, 1999). By an Order dated September 15, 1999, the Third Circuit supplemented its Petition for Certification to the Pennsylvania Supreme Court by informing that court that the same issue is presented in forty other cases pending in the Third Circuit. *Coady v. Vaughn*, 98-1311, slip order (3d Cir. Sept. 15, 1999). By an Order dated December 17, 1999, the Pennsylvania Supreme Court granted the Third Circuit's Petition for Certification. *Coady v. Vaughn*, slip order (Pa. Dec. 17, 1999). The Pennsylvania Supreme Court has not yet answered the questions certified to it by the Third Circuit.

Commonwealth Court's original jurisdiction." *Carter v. Muller*, 45 F. Supp.2d 453, 455 (E.D. Pa. 1999).

The respondents argue that the petitioner has failed to exhaust state remedies. The respondents argue that although the petitioner alleged that he filed a petition for a writ of mandamus to the Supreme Court of Pennsylvania on December 22, 1999, the petitioner has not alleged that he filed any action in a lesser state court seeking review of his claim. Accordingly, the respondents argue that the petitioner has not presented his claim to the Pennsylvania courts in a procedurally correct manner.

The petitioner contends that not only did he present a petition for a writ of mandamus to the Pennsylvania Supreme Court raising his *ex post facto* claim[2] but that he also presented a petition for a writ of mandamus to the Commonwealth Court of Pennsylvania raising his *ex post facto* claim. The petitioner has presented an Order dated December 13, 1999, from the Commonwealth Court of Pennsylvania which provides:

> NOW, December 13, 1999, it appearing that petitioner seeks by way of mandamus to be paroled, and that the decision as to whether to grant parole is discretionary, see Reider v. Pennsylvania Board of Probation and Parole, 514 A.2d 967 (Pa. Cmwlth. 1986), and, therefore, not subject to mandamus in

---

[2]The petitioner has presented an Order from the Supreme Court of Pennsylvania dated March 27, 2000, which provides: "**AND NOW**, this 27th day of March, 2000, the request for leave to file an the Motion to Relax the Required Number of Copies to be Filed are granted and the Application for Immediate Hearing and the Petition for Writ of Mandamus are denied." (Doc. 2, Exhibit 6).

> our original jurisdiction, the petition for review is dismissed.

(Doc. 22, Exhibit 1).

The above order from the Commonwealth Court seems to indicate that the petitioner had no available state court remedies to challenge his denial of parole on *ex post facto* grounds. Nevertheless, the petitioner did attempt to present his claim to the state courts. We conclude that the petitioner has exhausted his state court remedies.

On July 21, 1999, the Pennsylvania Board of Probation and Parole (Board) denied the petitioner parole. The Board stated:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to: be reviewed in or after September, 2000.

Doc. 2, Exhibit 4. It is this denial of parole that the petitioner is challenging as an *ex post facto* violation.

The United States Constitution forbids *ex post facto* laws. U.S. Const. Art. I, §9 & §10. The *Ex Post Facto* clause is aimed at laws that retroactively alter the definition of a crime or that increase the punishment for criminal acts. *California Dept. Of Corrections v. Morales*, 514 U.S. 499, 504 (1995). Two critical elements must be present for a law to be found to be *ex post* facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (footnotes omitted).

Retroactive changes in laws governing parole of prisoners may in some instances violate the prohibition against *ex post facto* laws. *Garner v. Jones*, 120 S. Ct. 1362, 1367 (2000). "[T]he Ex Post Facto Clause should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" *Id.* at 13678 (quoting *Morales, supra,* 514 U.S. at 508). The *Ex Post Facto Clause* does not forbid every legislative change that has any conceivable risk of affecting a prisoner's punishment. *Morales, supra,* 514 U.S. at 508. Rather, the controlling inquiry is whether the change creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509. The prisoner "must show that as applied to his own sentence the law created a significant risk of increasing his punishment." *Garner, supra,* 120 S.Ct. at 1370.

In the instant case, the petitioner claims that a change in 61 P.S. § 331.1 has been applied to him in violation of the *Ex Post Facto* Clause.

At the time the petitioner committed his crimes, 61 P.S. § 331.1 provided:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

In 1996, 61 P.S. § 333.1 was amended and now provides:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

The petitioner contends that the amendment which includes the provision that the Board "shall first and foremost seek to protect the safety of the public" has been retroactively applied to him and has caused him not to be paroled.

In determining whether a change in the law violates the *Ex Post Facto* Clause, "[i]t is axiomatic that '[w]e must compare the two statutory procedures in toto to determine if the new [law] may be fairly characterized as more onerous." *Crowell v. U.S. Parole Comm'n*, 724 F.2d 1406, 1409 (3d Cir. 1984) (quoting *Dobbert v. Florida*, 432 U.S. 282, 294 (1977)).

In the instant case, although the old version of 61 P.S. § 331.1 did not contain a directive that the Board protect the public, protection of the public was a factor that the Board was to consider. 61 P.S. § 331.21 provided:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby.

Both before and after the 1996 amendments to the Parole Law, the Board was charged with protecting the public. The law in this respect did not change. The standard for granting or denying parole did not change. However, we recognize that the change in 61 P.S. § 331.1 may be seen as a change in emphasis.

Both before and after the 1996 amendments the Board had and has discretion to grant or deny parole. *See* 61 P.S. § 331.21 (1993); 61 P.S. § 331.21 (1999).

The presence of discretion in a parole system does not displace the protections of the Ex Post Fact Clause. *Garner, supra,* 120 S.Ct. At 1369. However, "[c]hanges in vigor in the application of existing laws are not new laws subject to invalidation by the ex post facto clause." *Bonilla v. Vaughn,* No. Civ. A. 97-7440, 1998 WL 480833 at *7 (E.D. Pa. Aug. 14, 1998) ("At most, petitioner has set forth some evidence from which it may be inferred that the Board has exercised a change in emphasis of the implementation of existing laws which change is not unconstitutional."); *See also Garner, supra,* 120 S.Ct. At 1369 ("On the other hand, to the extent that there inheres in ex post facto doctrine some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression, we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in

the manner in which it is informed and then exercised."); *Prater v. U.S. Parole Comm'n*, 802 F.2d 948, 952 (7th Cir. 1986) ("If judges get tougher on crime by meting out stiffer sentences or resolving more close procedural questions against criminal defendants, or prosecutors drive harder plea bargains, or the Parole Commission takes a more jaundiced view of applications for parole, the ex post facto prohibition is not violated, even though a criminal's punishment may end up being longer or harsher than he hoped when he committed the crime.").

A change in how the Board exercises its discretion or what factors it emphasizes is merely part of the uncertainty which was inherent in the Pennsylvania discretionary parole system, to which the petitioner became subject as the result of his imprisonment following his conviction of crimes. The petitioner can not establish an *Ex Post Facto* violation.

Based on the foregoing, it is recommended that the petition for a writ of habeas corpus be denied and that the case file be closed.

J. Andrew Smyser
Magistrate Judge

Dated: November 2, 2000.

Supreme Court, U.S.
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No. 03-47

In The Supreme Court of the United States

FRANK D. GILLIS, et al.,

Petitioners,

v.

JOHN HOLLAWELL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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STATEMENT OF JURISDICTION

There is no jurisdiction because the cases are moot. The state was denied a stay of the Third Circuit's judgment in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), ordering reconsideration and a parole hearing within 45 days. The Parole Board held the parole hearing and refused Thomas parole on May 23, 2003. In *Hollawell v. Gillis*, the state did not attempt to obtain a stay of the Third Circuit's judgment ordering a re-adjudication of his parole application. On remand, on July 18, 2003 the district court ordered a decision on reconsideration within 90 days.

STATEMENT OF THE CASE

Louis Mickens-Thomas has been incarcerated since 1964 on a life sentence for a conviction of murder in the first degree. In 1995 Mr. Thomas received a commutation of his life sentence by the Governor of Pennsylvania after a unanimous recommendation from the Board of Pardons. At the time, he was 66 years old and had been incarcerated for 31 years on his murder conviction. The Pardons Board noted his sterling prison record, his attainment of a college degree, the therapeutic programs he had taken, and his extensive community support. App. Vol. II, 40-41.[1] "The Staff, Superintendent and Commissioner all support commutation due to the applicant's maturity and stability." App. Vol. II, 40.

[1] "App. Vol." refers to the record before the Third Circuit.

The commutation order made Mr. Thomas eligible for parole consideration in July of 1996. The Parole Board initially refused to consider him for parole. However, in response to a state court mandamus action, it conceded that it had unconstitutionally retroactively applied a new statute to his case. Pet. 10, n. 10; Pet. App. 66a. In 1997 and again in 1998 Mr. Thomas was refused parole. After exhausting state remedies (Pet. 10), Mr. Thomas filed a habeas corpus petition in federal district court alleging, among other grounds, that the retroactive application of the parole policy statute, 61 P.S. §331.1, as amended in 1996, violated his ex post facto rights. Extensive discovery was conducted to examine, in accordance with *Garner v. Jones*, 529 U.S. 244 (2000), the Parole Board's "policy statements, along with the Board's actual practices" to determine "whether, as a matter of fact, the amendment . . . created a significant risk of increased punishment." *Id.*, 529 U.S. at 256. The district court, considering the evidence from Mr. Thomas's file, statistical evidence, and the Board's statements explaining the import of the statute, before and after it was amended, concluded that Mr. Thomas's ex post facto rights were violated by the application of the amended statute, 61 P.S. §331.1, because it significantly decreased the opportunity for parole he would have had under the pre-1996 statute. Pet. App. 63a-77a.

The Third Circuit affirmed in a thorough, fact-intensive opinion. *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003) (Pet. App. 23a-60a). Mr. Thomas had no prison misconducts after being granted commutation, he had continued therapeutic programs, and he had maintained extensive community support and institutional recommendations for parole. Pet. App. 34a-37a. The Third

Circuit concluded after examining the Parole Board's practices and policies under the respective versions of 61 P.S. §331.1 that Mr. Thomas would have been paroled under the rehabilitative model of the statute in effect from 1941-1996, and that parole was denied because of the application of the 1996 amended statute which had a new public safety focus on eliminating any risk of reoffending. Pet. App. 27a-34a; 40a-49a; 55a-58a.

In support of the holding that Mr. Thomas had been significantly prejudiced by the application of the amended 1996 statute, the court of appeals pointed to the "quite staggering" statistical evidence that of 266 inmates with commuted life sentences in the history of Pennsylvania under the pre-amended parole statute "all were granted parole on the first or second application." Pet. App. 44a. Denials on a first application were because of post-commutation misconduct. Pet. App. 69a; App. Vol. III, 395-411. Mr. Thomas, with no post-commutation misconduct, now 75 years old, has been denied parole four times since 1997. The Third Circuit concluded: "[t]he Thomas application is distinguished from these 266 cases only by the intervening policy directive of 1996, emphasizing public safety." Pet. App. 44a.

After the Third Circuit ordered parole reconsideration for Mr. Thomas under applicable pre-1996 law and policies, the Parole Board sought a stay which was denied by that court on April 7, 2003. An application for reargument was also denied (Pet. App. 80a-81a) with no dissent. On

May 23, 2003, the Board, on reconsideration, refused parole again.[2]

John Hollawell was convicted of bribery and related offenses in Pennsylvania and sentenced to 6-1/2 – 23 years imprisonment in 1990. After he was refused parole on July 21, 1999 (Pet. App. 5a), he exhausted state remedies and filed a habeas corpus petition in federal district court. (Pet. 9a-11a). Mr. Hollawell raised the same ex post facto claim as Mr. Thomas concerning the application of the 1996 amended version of 61 P.S. §331.1 to his parole consideration. In a non-precedential opinion, he was granted habeas relief on the basis of the decision in *Mickens-Thomas*. Pet. App. 1a-16a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Decisions Below, Involving The Retroactive Application Of A Statute, Do Not Raise The Question Of Whether Internal Policies Are Laws.

The first question raised by Petitioners (Pet. I) is simply not presented by these cases. These cases "arise out of an amendment to Pennsylvania's parole statute." Pet. 3. The district court in *Mickens-Thomas* held that the retroactive application of the parole statute, 61 P.S. §331.1, as

[2] A motion to enforce the habeas corpus judgment, contending that the Parole Board's latest refusal did not comply with the Third Circuit's holding and the Ex Post Facto Clause, was denied by the Third Circuit on June 18, 2003 without prejudice. A motion to enforce the habeas corpus judgment was then filed in the district court, and is now pending.

amended in 1996, violated Mr. Thomas's ex post facto rights. Pet. App. 77a-80a. In accordance with *Garner v. Jones*, 529 U.S. 244, 256 (2000), the Third Circuit considered the practices and policies of the Parole Board under the former version of the statute, and under the 1996 amended version to determine whether there was an ex post facto violation. The Third Circuit affirmed, concluding that the amended statute provided a more onerous standard for parole (Pet. App. 39a-46a), and that the retroactive application of the amended 1996 statute seriously disadvantaged parole chances for Mr. Thomas and violated his ex post facto rights. Pet. App. 46a-58a.

"Like Mickens-Thomas, Hollawell based his claim on the amendment to Section 331.1 of the Parole Act." Pet. 16. The Third Circuit's non-precedential decision in *Hollawell* followed the *Mickens-Thomas* "holding that the statutory change did constitute an Ex Post Facto violation with respect to an individual already sentenced." Pet. App. 12a.

The Parole Board does not contest the settled proposition that a statute is a law for ex post facto purposes. And, since this case was decided below on the basis of a change in the statutory law on parole, the asserted conflict between courts of appeals on the question of whether internal policies are laws for ex post facto purposes is quite beside the point. None of the cases relied on by the state (Pet. 19-22) were discussed in the decisions below because they do not involve the retroactive application of a statute. To the contrary, these cases involve changes in internal policies or regulations. Here, entirely consistent with this Court's decision in *Garner v. Jones*, the policies and practices of the Board were considered only as a matter of context in determining "whether, as a matter of fact, the

[statutory] amendment . . . created a significant risk of increased punishment." *Garner v. Jones*, *supra*, 529 U.S. at 256.

2. There Is No Conflict With Precedential Decisions of the Supreme Court of Pennsylvania.

It is clear that "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner v. Jones*, *supra*, 529 U.S. at 253. Pennsylvania law, contrary to the claims of the state, also recognizes that there is no "unfettered discretion" to deny parole. *See* Pet. 25. "Absent a change in the statutes governing parole, . . . denial of parole would generally constitute a discretionary matter that is not subject to review." *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001). Where, as here, there has been a change in the statutes governing parole, "an action for mandamus remains viable as a means for examining whether statutory requirements have been altered in a manner that violates the ex post facto clause." *Id. See also*, *Poindexter v. Pennsylvania Board of Probation and Parole*, 798 A.2d 1276 (Pa. 2002) (per curiam).

The state asserts that the decision in *Winkelspecht v. Pennsylvania Board of Probation and Parole*, 813 A.2d 688 (Pa. 2002), creates a conflict with the decisions of the Third Circuit finding an ex post facto violation in the retroactive application of the amended parole statute, 61 P.S. §331.1. However, as the state recognizes, the lead opinion in *Winkelspecht*, finding no ex post facto violation, on behalf of three members of the Court, is a plurality opinion. Pet. 25. Plurality opinions have no precedential value in Pennsylvania. *E.g.*, *Hoy v. Angelone*, 720 A.2d 745, 750 (Pa. 1998); *In the Interest of O.A.*, 717 A.2d 490,

496 n.4 (Pa. 1998); *In re Reyes*, 381 A.2d 865, 871 (Pa. 1977).

The concurring and dissenting opinion by Justice Saylor, which is the dispositive opinion in this case, denies ex post facto relief because Winkelspecht presented *no* evidence in support of his ex post facto claim. The holding was limited to a finding that "there is no facial violation of the Ex Post Facto Clause." *Winkelspecht*, 813 A.2d at 697. Relying on the framework for ex post facto analysis established by this Court (813 A.2d at 695-97), Justice Saylor concluded that the claim must fail because "Petitioner has failed to adduce *any* such evidence" establishing that the statutory amendment was likely to enhance punishment. 813 A.2d at 697. (Emphasis added). However, Justice Saylor expressly recognized that an ex post facto violation could be established if a prisoner presented "some evidence of a systemic change in the rate at which the Board grants parole, or other proof regarding changes in parole frequency following the 1996 [statutory] amendment." *Id.* at 697. *Winkelspecht* preceded the decision in *Mickens-Thomas* which, based upon the band of evidence referenced by Justice Saylor analyzed the actual practices and policies of the Parole Board with respect to the pre-amended version of 61 P.S. §331.1, and the post-1996 statute.

Moreover, as the court of appeals noted, this case is exceptional in that respondent Thomas was part of a special sub-class of parole applicants – persons whose life sentences had been commuted to make them eligible for parole. As discussed above, respondent Thomas is the *only* such inmate of the almost 300 lifers with commuted sentences in Pennsylvania over the past 50 years who has

not been paroled. It is difficult to imagine more compelling evidence of a systemic change in parole.

A majority of the Pennsylvania Supreme Court may choose to follow *Mickens-Thomas*[3] or reach the same conclusion independently in a case, which unlike *Winkelspecht*, involves an evidentiary record and not merely a facial challenge. There is no conflict warranting review by this Court.

3. This Case Involves Only A Thorough, Fact-Intensive Analysis Correctly Applying Decisions Of This Court.

The court of appeals correctly applied this Court's ex post facto cases in a comprehensive and fact intensive decision. The state makes no claim that the Third Circuit ex post facto ruling in *Mickens-Thomas* is in conflict with this Court's decisions analyzing ex post facto claims in the parole and early release context. *See, e.g., Garner v. Jones*, 529 U.S. 244 (2000); *Lynce v. Mathis*, 519 U.S. 433 (1997); *California Department of Corrections v. Morales*, 514 U.S. 499 (1995). Indeed, *Garner* mandates the mode of analysis employed by the Third Circuit: an examination of the Parole Board's policies and practices to determine "whether, as a matter of fact" the statutory amendment has "created a significant risk of increased punishment." *Garner*, 529 U.S. at 256. The state's complaint is with the result reached by the court below.

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[3] The non-precedential decision in *Hollawell* depended on the "factual evidence of the amendment's practical effect" developed in *Mickens-Thomas* in applying the holding of that case. Pet. App. 16a.

The state appears to argue that the *Mickens-Thomas* decision incorrectly concluded that the statutory amendment to 61 P.S. §331.1 altered the standards for determining parole eligibility and made it significantly more difficult to obtain release. Pet. 8, 12 (Statement of Facts). However, both Pennsylvania intermediate appellate courts and the Parole Board have concluded (even before the decision in *Mickens-Thomas*) that the amendment to 61 P.S. §331.1 had made it dramatically more difficult for offenders convicted of violent crimes to obtain parole. *See, e.g., Voss v. Pennsylvania Board of Probation and Parole*, 788 A.2d 1107, 1111 (Pa. Cmwlth. 2001); *Stewart v. Pennsylvania Board of Probation and Parole*, 714 A.2d 502, 508 (Pa. Cmwlth. 1998). The Third Circuit's conclusion after a review of an extensive record is the kind of fact bound analysis that is not suitable for a grant of certiorari.

Review is also inappropriate in the *Mickens-Thomas* case because of unique and dispositive circumstances. Mr. Thomas is the only person in the history of Pennsylvania to be denied parole after having his life sentence commuted to make him eligible for parole consideration. Unlike other inmates who become eligible for parole after serving a judicially imposed minimum sentence, a lifer receives a minimum sentence and parole eligibility only after a complete investigation, public hearing, recommendation from the Pardons Board and approval by the Governor. *See* Article IV, §9, Pa. Const.; App. Vol. II, 40-42. The conclusion that the application of the amended 1996 parole statute had a negative impact on Mr. Thomas's parole chances was bolstered by the "staggering statistics" that between 1941 and 1996 every one of 266 commuted lifers had been paroled under circumstances no different from those presented here. Pet. App. 44a.

There was ample evidence to support a finding of an ex post facto violation in *Mickens-Thomas*. Moreover, that decision is of limited applicability given the unique and extraordinary circumstances of his case. *See* Pet. App. 69A-70a.[4]

4. Review Should Be Denied Because Of Mootness.

"Mootness is a jurisdictional question [under Article III] because the Court is not empowered to decide moot questions or abstract propositions." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). The state seeks an advisory opinion in the *Mickens-Thomas* case because there is no meaningful relief which this Court can now award. The Parole Board was denied a stay by the Third Circuit of its order to hold a parole hearing under applicable law within 45 days. It held the hearing and refused Mr. Thomas parole on May 23, 2003.

Because the Parole Board has refused parole, there is no meaningful relief this Court can grant to the Parole Board.[5] *See and compare Calderon v. Moore*, 518 U.S. 149

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[4] In the non-precedential opinion of *Gillis v. Hollawell*, relying on the extensive record of *Mickens-Thomas*, the Third Circuit found an ex post facto violation in the retroactive application of the statute in a case not involving a lifer with a commuted sentence. The non-precedential decision in *Gillis v. Hollawell* is not binding on any court, including other panels of the Third Circuit. Third Circuit IOP §§5.3, 9.1.

[5] The latest parole refusal of May 23, 2003 is now being challenged as a violation of the Third Circuit's order and the Ex Post Facto Clause in a pending Motion To Enforce Habeas Judgment in the district court. It is entirely speculative whether Mickens-Thomas will prevail on his motion requesting an order for parole. "Such speculative contingencies afford no basis for our passing on the substantive issues (the petitioner)

(Continued on following page)

(1996) (per curiam) (where habeas court ordered new trial, and scheduling process for new trial had begun, case not moot because new trial had not occurred). Consistent with past decisions of this Court where review has been denied when the litigant seeking review cannot be given any meaningful relief because of circumstances that developed after the initiation of litigation, certiorari should be denied here on mootness grounds. *See, e.g., Spencer v. Kemna*, 523 U.S. 1 (1998) (challenge to parole revocation mooted by expiration of sentence); *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980) (individual challenge to refusal to release on parole mooted after release from prison); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (challenge to law school admissions policies by student mooted by fact that his graduation from that law school was imminent); *North Carolina v. Rice*, 404 U.S. 244 (1971) (per curiam) (challenge to sentence became moot when it was fully served during course of litigation).[6]

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would have us decide." *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974), quoting *Hall v. Beals*, 396 U.S. 45, 49 (1969). In the event of such an outcome, a new order would be appealable to the Third Circuit and this Court by way of certiorari.

[6] *Hollawell* a non-precedential decision, has been joined with the *Mickens-Thomas* case in the request for certiorari.

CONCLUSION

Wherefore, for these reasons the petition for a writ of certiorari should be denied.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In light of respondents' mootness argument, *see* Br. in Opp. 10-11, we first address the developments in each case since we filed our petition.

CURRENT POSTURE OF THESE CASES

Mickens-Thomas v. Vaughn.

When we filed the petition for certiorari, the Court of Appeals had ordered the Board to give Mickens-Thomas a new hearing on his parole application within 45 days, applying the pre-1996 standards announced by the Court of Appeals. *See* Pet. App. 59a-60a. The Court of Appeals refused to stay its order pending a decision on this petition; accordingly, the Board issued a new decision on May 23, 2003, again denying parole.

Mickens-Thomas, claiming that the Board had not properly complied with the Court of Appeals' order, asked the Court of Appeals to order his immediate release. On June 18, 2003, the Court of Appeals denied that motion on the ground that it should have been made to the District Court. Mickens-Thomas then asked for the same relief in the District Court, which the District Court denied on August 22, 2003,[1] holding that "the Board did give [Mickens-Thomas] a fair hearing in light of ... the considerations in the Third Circuit opinion." Reply App. 10a. On September 9, 2003, Mickens-Thomas appealed that order to the Court of Appeals.

Hollawell v. Gillis.

The Board has not yet re-adjudicated Hollawell's parole application. The Court of Appeals ordered a new

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[1]The District Court's decision is reprinted in the appendix to this brief ("Reply App.") at 1a.

hearing for Hollawell "applying the pre-1996 statute and corresponding rules," Pet. App. 16a, but did not specify any time limit within which the Board had to act. On July 8, 2003, the District Court ordered the Board to re-adjudicate Hollawell's parole application within 90 days. The 90th day turned out to be October 6, 2003 — the opening day of the Court's new Term, and the earliest time at which the Court's disposition of our petition might be announced. In light of this, at the Board's request, the District Court extended its deadline by 30 days, to November 5, 2003.

ARGUMENT

I. The Court of Appeals' Erroneous Elevation of Internal Board Policies to Laws Is Central to Its Decisions And to Their Destructive Effects.

Respondents' primary argument against review is that the first question presented by the petition — whether the Parole Board's internal policies are "laws" for ex post facto purposes — "is simply not presented by these cases," Br. in Opp. 4, because they were "decided below on the basis of a change in the statutory law on parole." Br. in Opp. 5. This characterization, however, tells only half the story of what the Court of Appeals did. The real mischief of the Court of Appeals' decisions — the reason why these decisions are of such concern to Pennsylvania, and why they merit the Court's attention — lies precisely in their treatment of the Board's internal policies.

As we explained in our petition, before the 1996 amendment to the parole statute, Pennsylvania law conferred on the Parole Board virtually unreviewable discretion to grant or deny parole. Pet. at 3-4. If the Court of Appeals had *merely* held that the 1996 amendment changed this scheme by imposing "a more onerous standard for parole," Br. in Opp. 5, its decision would still

have been wrong — as the Pennsylvania Supreme Court held, "both versions of [the statute] leave the decision regarding the grant of parole within the discretion of the Board"[2] — but it would have had little practical impact. Such a decision would simply have restored to the Board the full measure of discretion which the Court of Appeals (erroneously) thought had been removed by the 1996 amendment. The Court of Appeals, however, did far more than this.

The Court of Appeals not only misunderstood the impact of the 1996 amendment, but seriously misconceived the nature of the parole scheme which existed before that amendment. The Court of Appeals disregarded the actual provisions of Pennsylvania's *statutory* scheme — entrusting the Board with broad discretion to grant or deny parole — in favor of its own vision of a Board whose discretion was tightly constrained by a variety of "parameters," which the Court of Appeals in turn cobbled together out of various *administrative* materials. *See* Pet. 12-13, *citing* Pet. App. 29a-32a, 44a-47a. The Court of Appeals did not consider these materials, as respondents would have it, "only as a matter of context," Br. in Opp. 5; rather, the Court of Appeals explicitly held that the Board's internal policies and practices constitute "discernible parameters that *govern its discretion*," Pet. App. 46a (emphasis added), and which cannot be changed without implicating the Ex Post Facto Clause.[3] Pet. App. 47a.

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[2] *Winklespecht v. Pa. Bd. of Probation and Parole*, 571 Pa. 685, 813 A.2d 688, 692 (2002).

[3] The fact that the changes perceived by the Court of Appeals were effected by a statute, as opposed to some administrative action by the Board itself, is thus mere happenstance. Indeed, one district court has already held that

(continued...)

This point is integral, not just to the Court of Appeals' analysis, but also to its judgments. In both *Mickens-Thomas* and *Hollawell*, the Court of Appeals expressly ordered the Board, not just to give Mickens-Thomas a new hearing, but also to apply the pre-1996 policies which the Court of Appeals had just elevated into binding rules.[4] Pet. App. 16a, 59a. In short, the Court of Appeals did indeed hold that the Board's internal policies constituted laws for ex post facto purposes, and ordered relief accordingly.

As we discussed in the petition, the Court of Appeals' treatment of the Board's internal policies directly conflicts with the treatment of similar issues by numerous other federal and state appellate courts, *see* Pet. 19-23, a point which respondents do not even address.

Further, this aspect of the Court of Appeals' decisions works a major distortion of the parole scheme established by Pennsylvania's legislature. The imposition of the detailed "parameters" announced by the Court of Appeals deprives the Board of the broad discretion entrusted to it by the legislature, and subjects the Board's decisions — intended by the legislature to be unreviewable even by

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[3](...continued)
Mickens-Thomas requires the same result whether the Board's internal policies were changed by statute, or by the Board's own action. *See Moore v. Ward*, Civil Action No. 00-0090 (July 10, 2003), *reprinted at* Reply App. 58a (invalidating a parole decision made *before* the statute had been amended).

[4]Indeed, the Board's alleged failure properly to apply these policies in his re-hearing is the basis on which Mickens-Thomas is now seeking release by the courts below. The suggestion that the treatment of the Board's internal policies plays no real role in these cases thus borders on the disingenuous.

the state courts — to extensive second-guessing by the federal courts, as illustrated by *Mickens-Thomas* itself. *See* Pet. App. 49a-54a. Further, these "parameters" are themselves unpredictable, since there is no knowing what stray statement — from a report to the legislature, perhaps, *see* Pet. App. 30a, or from an interview with the press, *see* Pet. App. 41a — will next be transmuted by the federal courts into a binding and unchangeable law. The effects of the decisions in these cases are, as we discuss below, already being felt in other cases.

II. The Court of Appeals' Decisions Are Irreconcilable With Numerous Decisions of Pennsylvania's Highest Court.

In our petition, we pointed out that the Court of Appeals' decisions — particularly its holding that the Board's internal policies constitute binding rules — are incompatible with an entire body of case law from Pennsylvania's highest court, concerning administrative agencies in general and the Board in particular. *See* Pet. 24-25. Respondents have not even attempted to argue otherwise.

Instead, respondents address only the conflict between the decisions below and the decision of the Pennsylvania Supreme Court in *Winklespecht v. Pa. Bd. of Probation and Parole*, 571 Pa. 685, 813 A.2d 688 (2002). Br. in Opp. 6-8. Respondents suggest that this conflict is either illusory ("[t]here is no conflict warranting review") or tolerable, because the Pennsylvania Supreme Court may, in some later case, change its mind and follow the lead of the Court of Appeals. Br. in Opp. 8. Even these limited arguments have little substance. The Court of Appeals itself made no attempt to distinguish *Winklespecht*, which it simply brushed aside. *See* Pet. App. 15a-16a, 54a-55a. As for the suggestion that this conflict may eventually resolve itself without the Court's

intervention, we submit that the courts of Pennsylvania will not likely defer to the federal Court of Appeals on an issue which is so thoroughly entwined with well-settled issues of state law; and in any event, the Commonwealth's parole system cannot be left indefinitely in limbo merely on the off-chance that they might.

The conflict between the Pennsylvania and federal courts — including, but emphatically not limited to, the conflict with *Winklespecht* — must be resolved now, for the harm inflicted by the Court of Appeals is already beginning to spread.

III. The Holding in *Mickens-Thomas* Has Been Broadly Applied by Both the Court of Appeals and District Courts, and Threatens Pennsylvania's Parole System with Widespread Instability.

Next, respondents suggest that the holding in *Mickens-Thomas* will apply only to prisoners who, like Mickens-Thomas, became eligible for parole upon commutation of a life sentence. Br. in Opp. 9-10. *Mickens-Thomas*, they say, is a "fact bound analysis," "not suitable for a grant of certiorari," which will have only limited effect because of its "unique and dispositive circumstances." Br. in Opp. 9. That was indeed the petitioners' hope when *Mickens-Thomas* came down; but that hope quickly proved unfounded.

The argument respondents now make is precisely the argument which petitioners made to the Court of Appeals in *Hollawell*, to no avail. Hollawell was not a commuted lifer, and in *Hollawell* the Court of Appeals had virtually no factual record before it, but the court expressly rejected both petitioners' attempt to distinguish *Mickens-Thomas* and their call for further factual development. *See* Pet. App. 15a-16a. Rather, the Court of Appeals

characterized *Mickens-Thomas* as having decided the broad legal question of "whether retroactive application of a parole statute amendment expressing for the first time that 'the board shall first and foremost seek to protect the safety of the public' violates the *Ex Post Facto Clause*." Pet. App. 14a. *See also* Pet. App. 16a (*Mickens-Thomas* held "as a legal matter that the Pennsylvania statutory change violates the Ex Post Facto Clause.") Respondents make no attempt to reconcile their narrow reading of *Mickens-Thomas* with either the reasoning or the result in *Hollawell*.

District courts in Pennsylvania have been quick to take the hint; all of the district courts which have ruled on the issue have applied *Mickens-Thomas* broadly to invalidate denials of parole. So far, four different district court judges have issued writs of habeas corpus relying on *Mickens-Thomas*.[5] None of the prisoners involved in these cases was a commuted lifer, and none of the decisions turns on the facts of an individual case. Indeed, one district court thought that the facts were so unlikely to matter "in light of the clear guidance on the issue ... from the Third Circuit," that he issued the writ before the respondents had even been served with the habeas petition. Reply App. 53a, 57a.

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[5]These decisions are reprinted in the appendix to this brief. *See Hart v. Pa. Bd. of Probation and Parole*, No. 01cv1768 (W.D. Pa., Feb. 26, 2003), *appeal pending*, No. 03-1890 (3d Cir.), *reprinted at* Reply App. 12a; *Bowling v. Johnson*, No. 01cv1400 (W.D. Pa., April 16, 2003), *appeal pending*, No. 03-2466 (3d Cir.), *reprinted at* Reply App. 27a; *Benchoff v. Colleran*, No. 03cv0740 (M.D. Pa., June 6, 2003), *motion for reconsideration filed* (June 23, 2003), *reprinted at* Reply App. 46a; *Moore v. Ward*, No. 00cv0090 (M.D. Pa., July 10, 2003), *appeal pending*, No. 03-3202 (3d Cir.), *reprinted at* Reply App. 58a.

There thus appears to be no realistic possibility that *Mickens-Thomas* will be confined to its facts. Rather, Pennsylvania faces the very real prospect that every prisoner who was sentenced before the date of the 1996 amendment, and whose parole is denied, will challenge that denial in habeas; that every future change in Board policies or practices will provoke a similar series of challenges; and that every federal court which receives such a challenge will subject the Board's decision to the same intrusive scrutiny applied in *Mickens-Thomas* —if indeed they do not simply issue the writ without any scrutiny at all. Pennsylvania has turned to the Court to avert this widespread disruption to its parole system.

IV. These Cases Are Not Moot, but If They Were, the Proper Disposition Would Be to Vacate the Judgments Below.

Finally, respondents claim that *Mickens-Thomas* has become moot[6] because the Board has already issued the re-adjudication ordered by the Court of Appeals, and therefore "there is no meaningful relief which this Court can award." Br. in Opp. 10. Both the premise and the conclusion of this argument are incorrect.

It is certainly true that where a party has "fully and irrevocably" complied with the terms of an order, the correctness of that order on appeal becomes a moot question. *University of Texas v. Camenisch*, 451 U.S. 390, 398 (1981). The Board believes, and the District Court has held, that the Board fully complied with the Court of

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[6]Respondents do not claim that *Hollawell* is moot, and it clearly is not, since the Board has not yet held the re-hearing ordered by the Court of Appeals. *See Calderon v. Moore*, 518 U.S. 149 (1996) (per curiam) (case not moot where re-trial ordered by habeas court had not yet been held).

Appeals' judgment when it issued its decision on re-hearing, even though the Board once again denied Mickens-Thomas' parole application. This case therefore would indeed be moot, but for the fact that in the courts below Mickens-Thomas continues to maintain that the Board has *not* fully complied with the judgment.

Mickens-Thomas claims that he is entitled, not just to a re-hearing, but to a favorable decision from the Board; he has asked the Court of Appeals, and then the District Court, and now again the Court of Appeals, to order his immediate release on parole. If Mickens-Thomas is correct, then the Board will not have "fully" complied with the Court of Appeals' judgment until it releases him; and even then, its action would not be "irrevocable," since he could be taken back into custody if the Court should overturn the underlying judgment of the Court of Appeals. This case, then, remains very much alive.

Even if *Mickens-Thomas* were moot, it would not follow that the Court should deny the petition. Where a case becomes moot while a petition for certiorari is pending,

> the established practice of the Court ... is to reverse or vacate the judgment below and remand with a direction to dismiss. ... That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

United States v. Munsingwear, 340 U.S. 36, 39-40 (1950). *See* C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, § 3533.10, p. 434 & n. 31 (1984 & 2003 Supp.) (collecting cases). That was the course followed in *Honig v. Doe*, 471 U.S. 148 (1985) (per curiam), where the case was mooted by the petitioner's compliance with an injunction. If these cases should become moot, the Court should do likewise here.

Respectfully submitted,

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September 9, 2003

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS, Petitioner	:	CIVIL ACTION
	:	NO. 99-5161
v.	:	
DONALD VAUGHN, et al., Defendants.	:	

MEMORANDUM

BUCKWALTER, J. August 22, 2003

Before the court is Petitioner's motion to enforce habeas corpus judgment. The following paragraphs from that motion sets forth the background.

Louis Mickens-Thomas filed a petition for a writ of habeas corpus after being refused parole by the Pennsylvania Board of Probation and Parole a second time in 1998. This court granted the writ on March 15, 2002, finding an ex post facto violation. The Parole Board appealed.

On February 21, 2003, the Third Circuit Court issued a judgment and opinion affirming this court's grant of the writ of habeas corpus to Mr. Thomas.

The judgment and opinion of the Third Circuit provided conditional relief. The Board was given the opportunity to correct the constitutional violation by holding a new hearing on remand within 45 days, and reaching a fair decision in accordance with the specific directives of the appellate court.

If the Guidelines recommend release the Board should

fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release.

The Parole Board's petition for reargument en banc was denied on March 24, 2003. On April 7, 2003, the Board's motion to stay or recall the mandate was denied, and on April 10, 2003, the Third Circuit certified its judgment in lieu of a formal mandate.

On May 22, 2003, the Parole Board issued a decision which refused parole to Mr. Thomas for a fourth time.

On June 4, 2003, Mr. Thomas filed a motion in the Third Circuit requesting immediate release from custody, and a motion to enforce habeas corpus judgment. On June 18, 2003, in an order attached as Exhibit "D", the Third Circuit denied the motions without prejudice to present them to this court. "It is for the District Court to determine whether the action by the Board of Probation and Parole is consistent with the opinion of this court."

In support of his motion, petitioner argues that:

1. The Board's fourth parole refusal is in violation of the Third Circuit's opinion and order. See Memorandum of Law in Support of Motion.

2. The Board has manipulated the 1990 Guidelines to recommend a parole refusal. When these same Guidelines were applied to Mr. Thomas in 1997 and 1998, they recommended release. See, e.g., Mickens-Thomas, 321 F.3d at 387, 390. The added factor points of

prior record substance abuse, resulting in a refusal recommendation, are not required by or justified under the Guidelines and have been added as a post-litigation strategy to deny parole.

3. If the Guidelines were properly and fairly computed, the recommendation would be release on parole. The Board has failed to fairly justify a decision contrary to these Guidelines "buttressed by unique factors which outweigh the Guidelines endorsement." Mickens-Thomas, 321 F.3d at 393.

4. The Board has asserted that Mr. Thomas has not meaningfully participated or benefitted from sex therapy programs. Exhibit "C", 3,5. This "reason" for parole denial is pretextual as it was not stated by the Board for the parole refusals of 1997 and 1998. Mr. Thomas has participated in every available program. A new statute, 42 Pa. C.S. § 9718.1, barring parole for a "denier" who cannot complete the current sex therapy program is being unconstitutionally applied to Mr. Thomas.

5. The Board relies on impermissible factors, such as arrests and unsubstantiated charges from over 40 years ago. It also places heavy weight on Mr. Thomas' steadfast assertion of innocence, a fact known to the Pardons Board and Governor when commutation was granted and which was not a barrier under pre-1996 law.

6. The Board's conclusion that Mr. Thomas, who is now 75 years old, is an "unrehabilitated ... dangerous sexual offender who ... is likely to offend if released" (Exhibit "C", 5) is completely refuted by the Board's own guidelines and explanatory notes, which conclude that Mr. Thomas is an extremely low risk to offend. It is rebutted as well by the consistent psychiatric and institutional evaluation evidence that there is no contraindiction to parole.

7. If the Board has fairly considered the overwhelming evidence favoring release under pre-1996 standards, Mr. Thomas would have been paroled just as every other inmate who has had his life sentence commuted since 1941 has been paroled. "The Thomas application is distinguished from these 266 cases only by the intervening policy directive of 1996, emphasizing public safety." Mickens-Thomas, 321 F.3d at 385.

8. The Board has violated the terms of the Third Circuit Court's opinion and conditional habeas order, and petitioner's ex post facto and substantive due process rights.

9. The Board has violated the First Amendment and the Due Process Clause by vindictively denying parole in retaliation for petitioner's successful federal habeas corpus action.

As to his first argument, for reasons which will be set forth hereafter, petitioner is correct the Board's fourth parole refusal violates the Third Circuit's opinion. Secondly, the argument that the Board manipulated the guidelines is based upon the fact that it added a factor of prior record substance abuse. This added factor resulted in a guideline recommendation of parole refusal. Thus, as stated in his third argument, if the guidelines had been properly and fairly computed, the recommendation would be for parole and the Board would have to justify its decision "by unique factors which outweigh" that recommendation.

But as stated with regard to the first argument, the Board's fourth refusal violated the Third Circuit's opinion. Whether the board failed to read the opinion, interpreted it incorrectly or just flat out ignored it cannot be ascertained from the record before me. But that it ruled

contrary to the opinion in adding the factor of prior substance abuse is not reasonably debatable.

Here is what the Third Circuit said in its opinion:

> In 1997 and 1998 the Guidelines protocol resulted in a conclusion that Thomas should be released, but he was not. In 2000, the protocol recommended against parole. The date entered into the chart for past substance abuse changed, and thus he was then classified as a habitual offender with history of past abuse. The record shows some alcohol abuse by Thomas, but no drug use. Moreover, this reclassification on the Guidelines worksheet increased his overall objective score and placed him in the range of cases where the Guidelines recommended against parole. There is no evidence that alcohol abuse should, suddenly, as of the 2000 report, be given such significance: The Guidelines recommendation in 2000 is not worthy of consideration because it appears to have been deliberately designed to achieve a non-parole decision.
>
> The Guidelines did not show him to be a recidivism risk. The Board did not consider seriously psychological contraindications or any other non-Guidelines factor that might have militated against parole.

Following is what the Board says in its notice of board decision (fourth refusal):

> NOTE: THE 1990 GUIDELINES MANDATE THAT SUCH INSTANCES OF ALCOHOL ABUSE BE ADDED INTO THE GUIDELINE SCORE AND DO NOT ALLOW EXCEPTIONS BASED UPON THE LENGTH OF INCARCERATION OR UPON PARTICIPATION IN INSTITUTIONAL ALCOHOL ABUSE PROGRAMS.

EVIDENCE IN THE FILE CLEARLY DEMONSTRATES YOUR HISTORY OF ALCOHOL ABUSE; AND, AT YOUR RECENT INTERVIEW, YOU ADMITTED ABUSING ALCOHOL. THE OMISSION OF THIS FACTOR IN ANY PREVIOUSLY-COMPLETED 1990 GUIDELINE FORM WAS THEREFORE ERRONEOUS.

In my view, in saying "there is no evidence that alcohol abuse should, suddenly, as of the 2000 report be given such significance" applies equally to the Board decision now before the court.

Without the two points added for alcohol abuse, this court's review is to determine if the Board's decision contrary to the guideline recommendation is "buttressed by unique factors which outweigh the guidelines endorsement."

Those other factors are listed in Part V of the Board's decision as follows:

V. OTHER FACTORS (NOT COUNTED IN 1990 GUIDELINE SCORE) WHICH INDICATE THAT PAROLE SHOULD BE REFUSED:

(1) YOU HAVE A HISTORY OF MULTIPLE PRIOR ASSAULT ARRESTS, INCLUDING THE FOLLOWING:

A. IN 1945 YOU WERE ARRESTED FOR RAPE [JUVENILE].
B. IN 1959 YOU WERE CHARGED WITH CHOKING A PREGNANT WOMAN WITH A SCARF, UNTIL SHE PASSED OUT.
C. IN 1959 YOU WERE ALSO ACCUSED OF ATTACKING A 14-YEAR-OLD BABYSITTER, WITH YOUR PANTS REMOVED AND SHE FIGHTING TO GET FREE.
D. IN 1961 YOU WERE ACCUSED OF ASSAULT WITH

A BLACKJACK.

[2] STATEMENTS FROM YOUR FORMER WIFE INDICATE THAT WHEN YOU DRANK YOU ALWAYS WANTED TO ENGAGE IN SODOMY AND WOULD BEAT AND CHOCK HERE IF SHE REFUSED TO COMPLY.

[3] YOUR ANGER AND RESENTMENT TOWARD WOMEN WAS EVIDENT IN YOUR RECENT INTERVIEW.

[4] YOU HAVE CONSISTENTLY REFUSED TO ACCEPT RESPONSIBILITY FOR YOUR CRIMES AND HAVE SHOWN NO REMORSE. THE BOARD BELIEVES THAT ACCEPTANCE OF GUILT IS THE FIRST AND MOST NECESSARY STEP TOWARD REHABILITATION. SEE MCKUNE V. LILE, 536 U.S. 24, 122 S.CT. 2017, 2032 (2002). YOU HAVE NOT TAKEN THIS FIRST STEP. NOR DOES THE BOARD BELIEVE THAT YOU ARE IN ANY SENSE JUSTIFIED IN DENYING GUILT, SINCE YOU WERE CONVICTED BY A JURY OF YOUR PEERS AND YOUR CONVICTION WAS UPHELD BY THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA. THAT COURT UNANIMOUSLY RULED THAT YOU RECEIVED A FAIR TRIAL AND THAT THE EVIDENCE "OVER-WHELMINGLY"[SIC] SUPPORTED YOUR GUILT. COMMONWEALTH V. THOMAS, 448 PA. 42, 292 A.2D 352, 356 (1972). FURTHER, THE FILE REFLECTS THAT YOU FAILED A POLYGRAPH TEST ADMINISTERED BY THE PHILADELPHIA POLICE DEPARTMENT AS TO YOUR DENIAL OF GUILT IN THE RAPE AND MURDER OF 12-YEAR-OLD EDITH CONNOR.

[5] YOUR REFUSAL TO ACCEPT RESPONSIBILITY FOR YOUR CRIMES HAS PREVENTED YOU FROM COMPLETING THE SEXUAL OFFENDER THERAPY

SO ESSENTIAL IN YOUR CASE. [ALTHOUGH THE SAME FACTOR ALSO HELPS TO EXPLAIN WHY THE BOARD COULD NOT DEPART FROM THE GUIDELINE RECOMMENDATION TO DENY PAROLE, THIS FACTOR WAS NOT ACTUALLY COUNTED IN THE GUIDELINE SCORE WHICH RESULTED IN THAT RECOMMENDATION AND IS, THEREFORE, IN ITS OWN RIGHT, AN ADDITIONAL CIRCUMSTANCE COUNSELING AGAINST THE GRANT OF PAROLE.] THIS THERAPEUTIC REGIMEN REQUIRES THAT YOU COMPLETE THREE PHASES OF TREATMENT. TO PROGRESS FROM THE FIRST TO THE SECOND PHASE REQUIRES THAT YOU ADMIT GUILT. YOUR REFUSAL TO DO SO HAS PREVENTED YOUR ADVANCEMENT BEYOND THE FIRST PHASE AND, AS A CONSEQUENCE, HAS LEFT YOU AN UNREHABILITATED AND UNREPENTANT DANGEROUS SEXUAL OFFENDER WHO, IN THE BOARD'S OPINION, IS LIKELY TO REOFFEND IF RELEASED.

[6] THE DISTRICT ATTORNEY'S OFFICE OF THE CITY OF PHILADELPHIA HAS OBJECTED TO YOUR RELEASE ON PAROLE FOR THE FOLLOWING REASONS, WHICH THE BOARD FINDS PERSUASIVE:

A. YOU STRANGLED A 12 YEAR OLD LITTLE GIRL;
B. YOU RAPED AND ANALLY SODOMIZED THAT LITTLE GIRL;
C. YOU ARE A VIOLENT SEXUAL OFFENDER, ESPECIALLY WHEN DRINKING;
D. YOU HAVE NEVER ACCEPTED RESPONSIBILITY FOR YOUR ACTIONS;
E. YOU HAVE NOT COMPLETED SEXUAL-OFFENDER THERAPY;
F. YOU ARE STILL IN DENIAL;
G. SEXUAL OFFENDERS, LIKE YOURSELF, ARE NOTORIOUSLY RECIDIVIST OFFENDERS.

[7] DESPITE YOUR AGE, YOUR PHYSICAL CONDITION IS GOOD AND WOULD NOT DETER YOUR CRIMINAL ACTIVITIES, IF YOU ARE RELEASED.

In deciding whether these factors are unique and outweigh the guidelines favoring parole, the Third Circuit Court's opinion is particularly helpful in determining pre-1996 parole procedures; that is, before the 1996 statutory mandate which the court found violated the ex post facto clause. In doing so, it is worth noting that court's assessment of the Board's function in past parole hearings involving petitioner. It said

> Although the Board has not given due consideration to the relevant factors, this can be explained by its misguided reliance on the post-1996 criteria. Moreover, we are exceedingly reluctant to usurp the Board's functions and, except in our review capacity, substitute our own judgment for that of the parole Board. Although there were flaws and oversights in the Board's consideration of Thomas's applications we are not entirely convinced that the Board is unable to give Thomas a fair hearing in light of the important consideration we have set forth in this opinion.

Pre-1996 parole criteria as stated in footnote 8, p. 379 of the Third Circuit opinion included:

> These factors include the presence of psychotic or dangerous behavioral characteristics manifested during the parole interview; recent psychiatric reports causing concern; a pattern of habitual offense of assaultive crimes; or an unfavorable recommendation from the Department of Corrections staff.

The whole idea in pre-1996 parole hearings is expressed at page 386 of the Third Circuit opinion as

follows:

> We conclude, then, that prior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one facto could not have been the basis of granting or rejecting parole.

The Board's latest parole decision reflects that it did "weigh all factors, militating for and against parole," and contrary to petitioner's argument, does not contravene the Third Circuit opinion. As specifically alluded to in that opinion, the Board's previous failure to give due consideration to relevant factors "can be explained by its misguided reliance on the post-1996 criteria."

The Board's decision (Exhibit "C" of petitioner's motion) speaks for itself and it will not be repeated here in detail except to say that as the Third Circuit opinion instructed, a court must be exceedingly reluctant to substitute its own judgment for that of the Board's.

Here, the Board did give petitioner a fair hearing in light of the important considerations set forth in the Third Circuit opinion. It was based on many factors, not one of which was dispositive as in prior decisions.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS, Petitioner	:	CIVIL ACTION
	:	NO. 99-6161
v.	:	
	:	
DONALD VAUGHN, et al., Defendants.	:	

ORDER

AND NOW, THIS 22nd day of August, 2003, it is hereby ORDERED that petitioner's motion to enforce habeas corpus judgment requesting that a conditional order for habeas corpus relief be made absolute is DENIED.

BY THE COURT:

/s/
RONALD L. BUCKWALTER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALEXANDER V. HART, AY-88912, Petitioner,	:	
vs.	:	Civil Action No.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, PHILLIP JOHNSON and MIKE FISHER, Respondents.	:	01-1768

AMBROSE, Chief District Judge

OPINION AND ORDER OF COURT

SYNOPSIS

Pending before the Court is a Petition for Writ of Habeas Corpus (Docket No. 4). After careful consideration of the submissions of the parties, and based on my Opinion as set forth below, I am granting Petitioner's Writ of Habeas Corpus to the extent that I am remanding the case to the Pennsylvania Board of Probation and Parole.

OPINION

Petitioner, Alexander Hart, has filed a Petition for Habeas Corpus relief pursuant to 28 U.S.C. § 2254, wherein he complains that the Pennsylvania Board of Probation and Parole ("Board") improperly refused his applications for release on parole for unconstitutional reasons. In his Petition, Petitioner avers that in August 2, 1983, he pled guilty to aggravated assault, robbery, burglary and criminal conspiracy, and the court

sentenced him to a term of imprisonment to ten (10) to twenty (20) years, followed by five (5) years of probation.[1]

After the expiration of his minimum sentence on May 25, 1995[2], Petitioner was eligible for parole under Pennsylvania law.[3] The Board denied Petitioner's parole application on October 13, 1995, November 20, 1996, June 6, 1997, July 23, 1999, and November 7, 2000. By notice dated October 13, 1995, the Board denied Petitioner's request citing the following reasons: poor prison adjustment; substance abuse; habitual offender; assaultive instant offense; victim injury; weapons involved in the commission of offense: firearm and knife; unfavorable recommendation from the Department of Corrections; threat to community. At that time, the Board required Petitioner to participate in a prescriptive plan, maintain a clear conduct record, and earn an institutional recommendation for parole. By notice dated November 20, 1996, Petitioner was again denied parole. This time the Board simply reaffirmed its prior action. By notice dated June 6, 1997, the Board again denied Petitioner's request for parole citing the following reasons: poor prison adjustment; substance abuse; habitual offender; assaultive instant offense; victim injury; weapons involved in the commission of offense: firearm

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[1]In December, 1970, Petitioner pled guilty as an accomplice to a charge of second degree murder for which he was given a sentence of ten to twenty years. On April 14, 1979, the Board granted him parole. It was while he was on parole that he was convicted of the instant offenses.

[2]Due to his prior conviction, the Board recommitted Petitioner in August 1983, to complete his original sentence. Therefore, Petitioner did not begin serving this sentence until May 25, 1985.

[3]See 61 Pa. Stat. § 331.21.

and knife; unfavorable recommendation from the Department of Corrections and District Attorney. Again, the Board required the Petitioner to participate in a prescriptive plan, maintain a clear conduct record, and earn an institutional recommendation for parole. The Board indicated that his application for parole was to be reviewed in May, 1999, or earlier, if recommended by the appropriate institutional staff because of demonstrable benefit from participation in an appropriate treatment program for Community Connections Center ("CCC") placement for nine months.

On July 23, 1999, the Board again denied Petitioner's request for parole indicating as follows:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore reused parole and ordered to: Be reviewed in or after May, 2001.
>
> At your next interview, the Board will review your file and consider: Whether you have received a favorable recommendation for parole from the Department of Corrections. Whether you have maintained a clear conduct record and completed the Department of Corrections' Prescriptive Programs(s).
>
> Your history of violent crime and parole failure indicate that you are not suitable for release at the present time.

By notice dated November 7, 2000, the Board again denied Petitioner's application for parole filed August 24, 2000 by simply reaffirming the Board action denying parole on July 23, 1999.

On December 12, 2000, Petitioner filed a Petition for Writ of Mandamus in the Commonwealth Court of Pennsylvania. On December 13, 2000, the Commonwealth Court dismissed the Petition holding that the Board's discretionary decision as to whether to grant parole was not subject to judicial review under Pennsylvania law. On March 12, 2001, the Supreme Court of Pennsylvania affirmed the Commonwealth Court's Order of December 13, 2000.

Petitioner filed his federal Petition for Habeas Corpus relief on September 21, 2001. As the bases for his request for habeas corpus relief, Petitioner asserts the following.

1. Sections 101 and 702 of Title 2 of the Pennsylvania Consolidated Statutes violate the Privileges and Immunities clause of Article IV and the First and Fourteenth Amendments to the United States Constitution.

2. Sections 101 and 702 of title 2 of the Pennsylvania Consolidated Statutes violate the Equal Protection Clause of the United States Constitution.

3. The laws, regulations, and/or rules in Pennsylvania governing the parole determining process fail to provide safeguards and/or guidelines in its laws governing parole to prevent arbitrary or capricious denials of parole, or, alternatively, the Pennsylvania legislature failed to provide such safeguards and/or guidelines.

4. The Parole Board violated Petitioner's due process rights under the Fourteenth Amendment when it rendered its November 7, 2000 decision because it failed to state sufficient reasons for its denial as required by law, abused the discretion granted to it under 61 P.S. § 331.22, failed in its duty to consider

Petitioner's application for parole as mandated by 61 P.S. § 331.22 and/or failed in its duty to consider the factors, mandated by 61 P.S. § 331.19.

5. The application of the 1996 parole laws and guidelines to Petitioner violates the ex post facto clause of the United States Constitution.

Before a state prisoner is entitled to seek federal habeas corpus relief under 28 U.S.C. § 2254, his claims must have been presented to the state courts through any available state court procedures. *See* 28 U.S.C. § 2254(b). This "exhaustion" requirement serves to protect the interest of comity, which ensures that the state courts have the first opportunity to address and correct violations of state prisoners' federal rights. Rose v. Lundy, 455 U.S. 509, 518 (1982); Preiser v. Rodriguez, 411 U.S. 475, 491 (1973). Accordingly, before a federal court addresses the merits of a state prisoner's claims, constitutional and federal law issues first must have been fairly presented to the state court through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g.,* Castille v. Peoples, 489 U.S. 346, 351 (1989); Picard v. Connor, 404 U.S. 270, 275 (1971); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996). The petitioner has the burden of establishing that exhaustion has been met. Ross v. Petsock, 868 F.2d 639, 643 (3d Cir. 1989); O'Halloran v. Ryan, 835 F.2d 506, 508 (3d Cir. 1987). Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state petitioner's claims prior to exhaustion when no appropriate state remedy exists. Christy v. Horn, 115 F.3d 201, 206, (1997); Doctor, 96 F.3d at 681; Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995).

Under current Pennsylvania law, Board decisions

denying parole applications are not subject to appellate review. *See* Rogers v. Commonwealth, Bd. of Probation and Parole, 555 Pa. 285, 724 A.2d 319 (1999); Weaver v. Pennsylvania Bd. of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997). Notwithstanding, an action in mandamus in the original jurisdiction of the Commonwealth Court of Pennsylvania may be available for a prisoner to pursue constitutional issues associated with the denial of parole. *See* Coady v. Vaughn, 770 A.2d 287 (Pa. 2001); Coady v Vaughn, 251 F.3d 480, 489 (3d Cir. 2001).

In this action, Petitioner attempted to exhaust his claims by presenting them in a mandamus action that he filed in the original jurisdiction of the Commonwealth Court of Pennsylvania. The Commonwealth Court did not review Petitioner's constitutional claims but dismissed his petition as improperly seeking parole release through a mandamus action. Through his Petition for Allowance of Appeal, which ultimately was denied, Petitioner presented his claims to the Supreme Court of Pennsylvania. Thus, it appears that Petitioner has attempted to comply with the exhaustion requirement notwithstanding the Pennsylvania court's failure to have reviewed the merits of his claims.

In Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit held that where the state court fails to adjudicate or address the merits of a petitioner's claims, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. Petitioner's claims will be reviewed in accordance with this standard.

A state prisoner may be granted federal habeas corpus relief only if he is in custody in violation of the Constitution or federal law. 28 U..C. § 2254(a) Smith v.

Phillips, 455 U.S. 209 (1982); Geschwendt v. Ryan, 967 F.2d 877 (3d Cir.), *cert. denied*, 506 U.S. 977 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). Violations of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before federal habeas relief may be granted. Engle v. Isaac, 456 U.S. 107 (1982); Wells v. Petsock, 941 F.2d 253 (3d Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992).

Petitioner asserts that the Board violated his constitutional rights by refusing his parole applications based on arbitrary political considerations instead of those considerations set forth in the Parole Act of 61 Pa. Stat. § 331.21(a). In this regard, petitioner points to the 1995 controversy surrounding the Board's release of several criminals who were charged with committing serious violent offenses.[4] One of these criminals, Robert "Mudman" Simon, shot and killed a New Jersey Police Officer during a routine traffic stop three months after his release. These events precipitated an intense investigation of Pennsylvania's parole system by the Senate Judiciary Committee of the Pennsylvania General Assembly, who reported the results of the investigation to the Governor. *See* Stewart v. Pennsylvania Board of Probation and Parole, 714 A.2d 502, 504, n.1 (citing Chairman's Report: Investigation into the Parole of Robert Simon, Senate of Pennsylvania Judiciary Committee, 179th Gen. Assembly 1995 Sess. 1-6 (February 1996)). As a result of this investigation, the Judiciary Committee made recommendations that the emphasis of Pennsylvania's parole philosophy should be changed from prisoner rehabilitation to the protection of public safety,

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[4]Fisher, Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders, 5 Widener J. Pub. L. 269, 284-289 (1996).

deterrence of crime and incapacitation of criminals. Id.

In 1995 and again in 1996, the Parole Act was amended to implement the suggested changes in parole policy for violent offenders. Section 1 of the Parole Act, 61 P.S. § 331.1, which enunciates the state's public policy concerning parole, was amended to provide that "the board shall first and foremost seek to protect the safety of the public." *See* Stewart, 714 A.2d at 508. Also, section 34 of the Parole Act was amended by adding a new section that prohibits the Board from acting upon a parole application for a violent offender unless the inmate has served at least one year in a prerelease center. *See* Myers v. Ridge, 712 A.2d 791, 795-96 (Pa. Commw. 1998), *appeal denied*, 742 A.2d 173, 560 Pa. 677 (1999). Also in section 34.1, the legislature added a definition for the term "crime of violence" to include murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, robbery, arson, aggravated assault or kidnapping, including a conviction for attempt to commit the above-listed crimes. Id.

In addition, several internal changes were implemented with respect to the Board's procedures for approving parole applications for criminals convicted of violent offenses. One change concerned the number of votes needed to approve a recommendation to grant parole. Specifically, the revised parole guidelines imposed a requirement for three signatures instead of two before a violent offender may be approved for release on parole. In addition, the Board was directed to certify that the rights of victims as set forth in section 21.1 (now codified as 61 Pa. Stat. § 331.22a) of the Parole Act were fully complied with whenever the Board approved the parole application for the release of a violent offender. *See*

Myers, 712 A.2d at 798.[5]

Petitioner asserts that the Board violated his constitutional rights by denying his application for parole based on political considerations. Respondents correctly note that petitioner does not have any liberty interest in being released from custody prior to the expiration of his maximum sentence that arises under the United States Constitution, the Pennsylvania Constitution or Pennsylvania law. Accordingly, Petitioner cannot have any procedural due process rights in the processing of his application for parole.

Notwithstanding, several courts, including the Court of Appeals of the Third Circuit, recognize that even though an inmate has no liberty interest in parole that implicates procedural due process, substantive due process may be violated if parole is denied by arbitrary government action. In this regard, courts have determined that decisions to grant or deny parole may violate a prisoner's right to substantive due process if such decisions are based on arbitrary and capricious factors. The Supreme Court has declined to set forth a precise rule that defines the scope of impermissible "arbitrary" conduct for purposes of applying the substantive component of the Due Process Clause. Nonetheless, the Supreme Court has clarified that governmental conduct does not violate a persons'

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[5]Section 22.1, which was added to the Parole Act in 1986, requires the district attorney to notify the victim of the offense (or an immediate family member) of his or her ability to present a statement for the parole Board's consideration or to testify at the parole hearing concerning the release of the defendant. When the defendant is being considered for parole, the Board is required to notify the victim or relative to allow them the ability to raise any objections to the defendant's release. *See* 61 Pa. Stat. § 331.22a.

substantive due process rights unless it amounts to an abuse of official power that "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 1718-19 (1998).

Thus, in reviewing the Board's exercise of discretion in denying an application for parole, this court's only role "is to insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." Block, 631 F.2d at 236. In its decisions, the Board identified many legitimate reasons for exercising its discretion in denying petitioner's applications for early release from prison, and therefore, it cannot be said that such action was arbitrary or capricious. However, the Petitioner asserts that the changes in the Board's criteria for approving parole applications for violent offenders in Pennsylvania has resulted in a violation of the Ex Post Facto Clause of the United States Constitution as these criteria have been applied to his parole applications.

The Ex Post Facto Clause of the United States Constitution provides that "[n]o state shall...pass any...ex post facto law." U.S. Const. Art. 1, § 10. The Supreme Court has instructed that "[t]o fall within the ex post facto prohibition, a law must be retrospective---that is it must apply to events occurring before its enactment---and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 117 S. Ct. 891, 896 (1997)(citation and quotation omitted). In analyzing whether a law violates the ex post facto clause, the courts are required to determine whether the law resulted in "a sufficient risk of increasing the measure of punishment attached to the covered crimes." California Dep't of Corrections v. Morales, 514 U.S. 499, 509 (1995).

Specifically, Petitioner raises the issue of whether the modification in the parole laws by the Pennsylvania legislature in 1996 and changes in the parole decision making policies of the Board as applied to Petitioner was a violation of the ex post facto clause. Recently, the Court of Appeals for the Third Circuit addressed this precise issue in Mickens-Thomas v. Vaughn, No. 02-2047 & 02-2213 (3rd Cir. Feb. 21, 2003). In Mickens-Thomas, the court found that although risks to public safety in granting parole have always been a consideration in the decisional process, "after 1996, the Board applied to the public safety interest far greater weight." Mickens-Thomas v. Vaughn, No. 02-2047 & 02-2213, slip op. at 16-17. The court noted as follows:

> The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of the public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Mickens-Thomas, No. 02-2047 & 02-2213, slip op. at 17. The Court explained that statistical evidence which it deemed to be "quite staggering" supported the conclusion that after 1996 there was a significant change in policy. Id. at 18. The court also pointed to "substantive declarations" of Board policy showing that after 1996 a new standard was applied:

> A 1996 report by the Legislative Judiciary Committee strongly exhorted the Board to reform its parole policies by placing greater stress on public safety. A 1997 self-assessment by the Board specifically noted that during the 1995-1997 period, public safety

became the Board's new "foremost concern." The new Guidelines, implemented between 1998 and 2000, placed more weight on "victim injury." The 2000 Board Decision denying [Petitioner's] parole noted that its action was consistent with the Board's "mandate" to protect the public. This language did not appear on earlier Board decisions and reflects its new parole policy. These declarations stand in bold contrast to the pre-1996 policies, which commanded that the Board give weight to various factors in the parole process, such as Department of Corrections staff recom-mendations, educational accomplishments, job training, and therapy programs. This factor-based approach strongly suggests that dispositive weight should not be given to any one factor. Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. Prior to 1996, a Board recommendation contrary to the Guidelines required that the Board have "appropriate reasons for [its parole denial] decision." Because the pre-1996 Guidelines already factored in the risk to pubic safety vis-a-vis relevant recidivism indicators, the Board after 1996 could not give added, and certainly not exclusive, weight to public safety in overruling the Guidelines.

Id. at 19. Accordingly, the court concluded that prior to 1996, the Board's concern for public safety could not be the "sole or dominant basis" for parole denial while post-1996, considerations of public safety became the "dominant concern" of the Board. Id. at 19-20.

In the instant case, as in Mickens-Thomas, the Board decision denying Petitioner's parole indicated that its action was consistent with "the mandates to protect the safety of the public." In addition, rather than weighing

specific factors, the Board simply indicated that Petitioner's "history of violent crime and parole failure indicates" that he is "not suitable for release at the present time." The notice of the Board simply reiterates that he must receive a favorable recommendation of parole from the Department of Corrections, maintain a clean conduct record and complete the prescriptive program. These are the same requirements as first required of him in 1995. The evidence of record does not contradict Petitioner's assertion that he fulfilled these requirements. Yet, the focus of the Board's action seems to be the underlying offenses rather than the efforts made by Petitioner to address the requirements of the Board.

Therefore, it is clear that the concern for public safety was given greater weight in the Board's determinations. Accordingly, as in Mickens-Thomas, the Board's actions in retroactively applying changes in the parole laws to Petitioner violated the ex post facto clause of the United States Constitution.

Although the Petitioner requests release, I cannot usurp the Board's functions and substitute my judgment for that of the Board. Mickens-Thomas, slip op at 31.[6] Accordingly, I will remand to the Board for a new hearing. Under the guidance provided by the Court of Appeals for the Third Circuit, "[i]f the Guidelines recommend release the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release." Id at 31.

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[6]In the instant case, there is no evidence that the Board intentionally evaded a court mandate or acted in bad faith.

DATE FILED:	FEBRUARY 26, 2003
PETITIONER'S COUNSEL:	Christine H. Nooning Esq. PO Box 100087 Pittsburgh PA 15233
RESPONDENTS' COUNSEL:	Att Gen Office Attn Francis R Filipi Esq. Strawberry Sq 15th Fl Harrisburg PA 15233

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALEXANDER V. HART, AY-88912, Petitioner,	:	
vs.	:	Civil Action No.
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, PHILLIP JOHNSON and MIKE FISHER, Respondents.	:	01-1768

ORDER OF COURT

THEREFORE, this **26th** day of February, 2003, it is ORDERED that Petitioner's Writ of Habeas Corpus be GRANTED to the extent that the case is REMANDED for a further hearing before the Pennsylvania Board of Probation and Parole to be held within forty-five (45) days under the standards that existed prior to the enactment of the amendments to the Probation and Parole Act codified at 61 P.S. 331.1.

BY THE COURT:

/s/
Donetta W. Ambrose,
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID BOWLING,	:	
Petitioner	:	
	:	
v.	:	Civil Action No. 01-1400
	:	Judge McVerry
MR. JOHNSON, PA.	:	Magistrate Judge Caiazza
BD. OF PROBATION	:	
AND PAROLE,	:	
Respondents	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

RECOMMENDATION

Pending before the Court is a Petition for Writ of Habeas Corpus (Docket No. 1). After careful consideration of the submissions of the parties, and based on my Report as set out below, I recommend that the Petitioner's Writ of Habeas Corpus be granted to the limited extent that the case be remanded to the Pennsylvania Board of Probation and Parole.

REPORT

Petitioner, David Bowling (Bowling), has filed a Petition for Habeas Corpus relief pursuant to 28 U.S.C. § 2254, wherein he complains that the Pennsylvania Board of Probation and Parole ("Board") improperly refused his applications for release on parole for unconstitutional reasons. In his Petition, Bowling claims that on September 14, 1992, he pled guilty to aggravated assault and, thereafter, was sentenced to a term of imprisonment of five (5) to fifteen (15) years. Petitioner's sentence was to have a minimum expiration date of February 11, 1997

and a maximum expiration date of February 11, 2007.[1]

After the expiration of his minimum sentence on February 11, 1997, Petitioner was eligible for parole under Pennsylvania law.[2] The Board denied Petitioners's parole application on January 2, 1997, February 4, 1998, January 25, 1999, January 25, 2000 and June 8, 2001. On January 2, 1997, the Board denied Petitioner's request citing the following reasons: substance abuse; habitual offender; assaultive instant offense; very high assaultive behavior potential, victim injury; weapon involved in the commission of offense; and need for treatment. At that time, the Board required Petitioner to participate in a prescriptive plan including AA and advanced alcohol abuse programming, maintain a clear conduct record, and earn an institutional recommendation for parole. On February 4, 1998, the Board again denied Petitioner's request citing the following reasons: substance abuse; habitual offender; assaultive instant offense; very high assaultive behavior potential, victim injury; weapon involved in the commission of offense-tire iron; unfavorable recommendation from the Department of Corrections; very serious assaultive offense with history of serious assaultive offense. At that time, the Board required Petitioner to participate in all prescriptive program plans, maintain a clear conduct record, and earn an institutional recommendation for parole. The Board indicated that eligibility for parole could be reviewed again in or after November, 1998, with a Community Connections Center evaluation for parole placement.

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[1]Petitioner was sentenced on December 9, 1992. At sentencing, Petitioner received credit for 300 days of imprisonment, from February 11, 1992 until December 9, 1992.

[2]*See* 61 Pa. Stat. §331.21

On January 25, 1999, the Board again denied Petitioner's request for parole indicating as follows:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to:
>
> Be reviewed in or after January, 2000.
>
> At your next interview, the Board will review your file and consider:
>
> Whether you have successfully completed a treatment program for: sex offenders and substance abuse.
>
> Whether you have received a favorable recommendation for parole from the: Department of Corrections.
>
> Whether you have maintained a clear conduct record and complete the Department of Corrections' Prescriptive Program(s).

On January 25, 2000, the Board again denied Petitioner's application for parole with the following decision:

> Following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to:

Be reviewed in or after January, 2002.

At your next interview, the Board will review your file and consider:

Whether you have successfully completed a treatment program for: sex offenders.

Whether you have received a favorable recommendation for parole from the: Department of Corrections.

Whether you have maintained a clear conduct record and completed the Department of Corrections' Prescriptive Program (s).

Your minimization of your crime and lack of insight after years of sex offender program causes concern.

On June 8, 2001, the Board once again denied Petitioner's request for parole with the following explanation:

Following a review of your file, the Pennsylvania Board of Probation and Parole has determined that the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to:

Be reviewed in or after June, 2003

At your next interview, the Board will review your file and consider:

Whether you have successfully completed a treatment program for: sex offenders, substance abuse, and prescribed programs.

Whether you have received a favorable recommendation for parole from the Department of Corrections.

Whether you have maintained a clear conduct record and complete the Department of Corrections' Prescriptive Program (s).

On December 20, 1999, the Commonwealth Court of Pennsylvania dismissed a Petition for Review filed by Petitioner, holding that the Board's discretionary decision as to whether to grant parole was not subject to judicial review under Pennsylvania law. On July 9, 2001, the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal filed by Petitioner.

Petitioner filed his federal Petition for Habeas Corpus relief on July 26, 2001. As the basis for his request for habeas corpus relief, Petitioner asserts, *inter alia*, that the application of the 1996 parole laws and guidelines to Petitioner violates the ex post facto clause of the United States Constitution.[3]

Before a state prisoner is entitled to seek federal habeas corpus relief under 28 U.S.C. § 2254, his claims must have been presented to the state courts through any available state court procedures. *See* 28 U.S.C. § 2254 (b). This "exhaustion" requirement serves to protect the interest of comity, which ensures that the state courts have the first opportunity to address and correct violations of state prisoners' federal rights. Rose v. Lundy, 455 U.S. 509, 518 (1982); Preiser v. Rodriguez, 411 U.S.

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[3]Petitioner asserts a number of legal theories and factual allegations in support of the argument that he is entitled to habeas corpus relief based on the continued denial of his applications for parole. Given my findings herein, I need not address each of Petitioner's legal arguments in this regard.

475, 491 (1973). Accordingly, before a federal court addresses the merits of a state prisoner's claims, constitutional and federal law issues first must have been fairly presented to the state courts through direct appeal, collateral review, state *habeas* proceedings, *mandamus* proceedings, or other available procedures for judicial review. *See, e.g.*, Castille v. Peoples, 489 U.S. 346, 351 (1989); Picard v. Connor, 404 U.S. 270, 275 (1971); Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996); Burkett v. Love, 89 F.3d 135, 137 (3d Cir. 1996). The petitioner has the burden of establishing that exhaustion has been met. Ross v. Petsock, 868 F.2d 639, 643 (3d. Cir. 1989); O'Halloran v. Ryan, 835 F2d 506, 508 (3d. Cir. 1987). Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state petitioner's claims prior to exhaustion when no appropriate state remedy exists. Christy v. Horn, 115 F.3d 201, 206 (1997); Doctor, 96 F.3d at 681; Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995).[4]

Under current Pennsylvania law, Board decisions denying parole applications are not subject to appellate judicial review. *See* Rogers v. Commonwealth, Bd. of Probation and Parole, 555 Pa. 285, 724 A.2d 319 (1999); Weaver v. Pennsylvania Bd. of Probation and Parole, 688 A.2d 766 (Pa. Commw. Ct. 1997). Notwithstanding, an action in mandamus in the original jurisdiction of the Commonwealth Court of Pennsylvania may be available for a prisoner to pursue constitutional issues associated with the denial of parole. *See* Coady v. Vaughn, 770 A.2d 287 (Pa. 2001); Coady v. Vaughn, 251 F. 3d 480, 489 (3d Cir. 2001).

In this action, Petitioner attempted to exhaust his

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[4]The respondent does not dispute that exhaustion has been met.

claims by presenting them in a mandamus action that he filed in the original jurisdiction of the Commonwealth Court of Pennsylvania.[5] The Commonwealth Court did not review Petitioner's constitutional claims but dismissed his Petition as improperly seeing parole release through a mandamus action. Through his Petition for Allowance of Appeal, which ultimately was denied, Petitioner presented his claims to the Supreme Court of Pennsylvania. Thus, it appears that Petitioner has attempted to comply with the exhaustion requirement notwithstanding the Pennsylvania courts' failure to have reviewed the merits of his claims.

In Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001), the United States Court of Appeals for the Third Circuit held that where the state court fails to adjudicate or address the merits of a petitioner's claims, the federal habeas court must conduct a *de novo* review over pure legal questions and mixed questions of law and fact. Petitioner's claims will be reviewed in accordance with this standard.

A state prisoner may be granted federal habeas corpus relief only if he is in custody in violation of the Constitution or federal law. 28 U.S.C. § 2254 (a). Smith v. Phillips, 455 U.S. 209 (1982); Geschwendt v. Ryan, 967 F.2d 877 (3d Cir.), *cert. denied*, 506 U.S. 977 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied*, 502 U.S. 902 (1991). Violations of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before federal

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[5]Petitioner has not included with his Petition a copy of his Petition for Review as filed with the Commonwealth Court of Pennsylvania. However, the Commonwealth Court's Order dated December 20, 1999 indicates that it was acting upon a Petition for Review whereby Petitioner sought "by way of mandamus to be paroled."

habeas relief may be granted. Engle v. Isaac, 456 U.S. 107 (1982); Wells v. Petsock, 941 F.2d 253 (3d Cir. 1991), *cert denied*, 505 U.S. 1223 (1992).

Essentially, Petitioner asserts that the Board violated his constitutional rights by refusing his parole applications based on arbitrary political considerations instead of those considerations set forth in the Parole Act at 61 Pa. Stat. § 331.21 (a). In this regard, Petitioner points to the alleged changes in Board policy as a consequence of a 1995 controversy surrounding the Board's release of several criminals who were charged with committing serious violent offenses.[6] One of these criminals, Robert "Mudman" Simon, shot and killed a New Jersey Police Officer during a routine traffic stop three months after his release. These events precipitated an intense investigation of Pennsylvania's parole system by the Senate Judiciary Committee of the Pennsylvania General Assembly, who reported the results of the investigation to the Governor. *See* Stewart v. Pennsylvania Board of Probation and Parole, 714 A.2d 502, 504, n.1 (citing Chairman's Report: Investigation in to the Parole of Robert Simon, Senate of Pennsylvania Judiciary Committee, 179th Gen. Assembly 1995 Sess. 1-6 (February 1996)). As a result of this investigation, the Judiciary Committee made recommendations that the emphasis of Pennsylvania's parole philosophy should be changed from prisoner rehabilitation to the protection of public safety, deterrence of crime and incapacitation of criminals. Id.

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[6]Fisher, Changing Pennsylvania's Sentencing Philosophy Through the Elimination of Parole for Violent Offenders, 5 Widener J. Pub. L. 269, 284-289 (1996).

policy for violent offenders. Section 1 of the Parole Act, 61 P.S. § 331.1, which enunciates the state's public policy concerning parole, was amended to provide that "the board shall first and foremost seek to protect the safety of the public." *See* Stewart, 714 A.2d at 508. Also, section 34 of the Parole Act was amended by adding a new section that prohibits the Board from acting upon a parole application for a violent offender unless the inmate has served at least one year in a prerelease center. *See* Myers v. Ridge, 712 A.2d 791, 795-96 (Pa. Commw. 1998), *appeal denied*, 742 A.2d 173, 560 Pa. 677 (1999). Also in section 34.1, the legislature added a definition for the term "crime of violence" to include murder of the third degree, voluntary manslaughter, rape, sexual assault, involuntary deviate sexual intercourse, robbery, arson, aggravated assault or kidnapping, including a conviction for attempt to commit the above-listed crimes. Id.

In addition, several internal changes were implemented with respect to the Board's procedures for approving parole applications for criminals convicted of violent offenses. One change concerned the number of votes needed to approve a recommendation to grant parole. Specifically, the revised parole guidelines imposed a requirement for three signatures instead of two before a violent offender may be approved for release on parole. In addition, the Board was directed to certify that the rights of victims as set forth in section 21.1 (now codified as 61 Pa. Stat. § 331.22a) of the Parole Act were fully complied with whenever the Board approved the parole application for the release of a violent offender. *See* Myers, 712 A.2d at 798.[7]

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[7]Section 22.1, which was added to the Parole Act in 1986, requires the district attorney to notify the victim of the offense (or an immediate family member) of his or her ability to present a statement for the parole Board's consideration or to testify at (continued...)

Respondents correctly note that Petitioner does not have any liberty interest in being released from custody prior to the expiration of his maximum sentence that arises under the United States Constitution, the Pennsylvania Constitution or Pennsylvania law.[8] Accordingly, Petitioner cannot have any procedural due process rights in the processing of his application for parole.

Notwithstanding, several courts, including the Court of Appeals for the Third Circuit, recognize that even though an inmate has no liberty interest in parole that implicates procedural due process, substantive due process may be violated if parole is denied by arbitrary

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[7](...continued)
the parole hearing concerning the release of the defendant. When the defendant is being considered for parole, the Board is required to notify the victim or relative to allow them the ability to raise any objections to the defendant's release. *See* 61 Pa. Stat. § 331.22a.

[8]*See, e.g.*, McFadden v. Lehman, 968 F. Supp. 1001, 1004 (M.D. Pa. 1997) (Pennsylvania has not created enforceable liberty interest in parole, rehabilitative pre-release programs, or in therapy programs); Rodgers v. Parole Agent SCI-Frackville, Wech, 916 F. Supp. 474, 476 (E.D. Pa. 1996); McCrery v. Mark, 823 F. Supp. 288 (E.D. Pa. 1993); Mickens-Thomas v. Commonwealth, Bd. of Probation and Parole, 699 A.2d 792 (1997) (parole is nothing more than a possibility; it merely constitutes favor granted by the state as a matter of grace and mercy); Tubbs v. Pennsylvania Bd. of Probation and Parole, 620 A.2d 584, 586 (Pa. Commw. Ct. 1993) ("it is well settled under Pennsylvania law that a prisoner has no constitutionally protected liberty interest in being released from confinement prior to the expiration of his sentenced maximum term ... the [Board] makes each decision on a case by case basis, and prisoners have no guarantees that parole will ever be granted"), *appeal denied*, 637 A.2d 295 (Pa. 1993).

government action. In this regard, courts have determined that decisions to grant or deny parole may violate a prisoner's right to substantive due process if such decisions are based on arbitrary and capricious factors. The Supreme Court has declined to set forth a precise rule that defines the scope of impermissible "arbitrary" conduct for purposes of applying the substantive component of the Due Process Clause. Nonetheless, the Supreme Court has clarified that governmental conduct does not violate a person's substantive due process rights unless it amounts to an abuse of official power that "shocks the conscience." County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 1718-19 (1998).

Thus, in reviewing the Board's exercise of discretion in denying an application for parole, this court's only role "is to insure that the Board followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." Block, 631 F.2d at 236. In its decisions, the Board identified many legitimate reasons for exercising its discretion in denying petitioner's applications for early release from prison, and, therefore, it cannot be said that such action was arbitrary or capricious. However, the Petitioner asserts that the changes in the Board's criteria for approving parole applications for violent offenders in Pennsylvania has resulted in a violation of the Ex Post Facto Clause of the United States Constitution as these criteria have been applied to his parole applications.

The Ex Post Facto Clause of the United States Constitution provides that "[n]o state shall ... pass any... ex post facto law." U.S. Const. Art. 1, § 10. The Supreme Court has instructed that "[t]o fall within the ex post facto prohibition, a law must be retrospective --- that is it must apply to events occurring before its enactment ---and it

must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 117 S. Ct. 891, 896 (1997) (citation and quotation omitted). In analyzing whether a law violates the ex post facto clause, the courts are required to determine whether the law resulted in "a sufficient risk of increasing the measure of punishment attached to the covered crimes." California Dep't of Corrections v. Morales, 514 U.S. 499, 509 (1995).

Specifically, the instant Petition raises the issue of whether the modification in the parole laws by the Pennsylvania legislature in 1996 and changes in the parole decision making policies of the Board as applied to Petitioner was a violation of the ex post facto clause. Recently, the Court of Appeals for the Third Circuit addressed this precise issue in Mickens-Thomas v. Vaughn, No. 02-2047 & 02-2213 (3d Cir. Feb. 21, 2003). In Mickens-Thomas, the court found that although risks to public safety in granting parole have always been a consideration in the decisional process, "after 1996, the Board applied to the public safety interest far greater weight." Mickens-Thomas, No. 02-2047 & 02-2213, slip op. at 16-17. The court notes as follows:

> The evidence here demonstrates that since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of the public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Mickens-Thomas, No. 02-2047 & 02-2213, slip op. at 17. The court explained that statistical evidence which it deemed to be "quite staggering" supported the conclusion

that after 1996 there was a significant change in policy. Id. at 18. The court also pointed to "substantive declarations" of Board policy showing that after 1996 a new standard was applied:

> A 1996 report by the Legislative Judiciary Committee strongly exhorted the Board to reform its parole policies by placing greater stress on public safety. A 1997 self-assessment by the Board specifically noted that during the 1995-1997 period, public safety became the Board's new "foremost concern." The new Guidelines, implemented between 1998 and 2000, placed more weight on "Victim Injury." The 2000 Board Decision denying [Petitioner's] parole noted that its action was consistent with the Board's "mandate" to protect the public. This language did not appear on earlier Board decisions and reflects its new parole policy. These declarations stand in bold contrast to the pre-1996 policies, which commanded that the Board give weight to various factors in the parole process, such as Department of Corrections staff recommendations, educational accomplishments, job training, and therapy programs. This factor-based approach strongly suggests that dispositive weight should not be given to any one factor.
>
> Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release. Prior to 1996, a Board recommendation contrary to the Guidelines required that the Board have "appropriate reasons for [its parole denial] decision." Because the pre-1996 Guidelines already factored in the risk to public safety vis-a-vis relevant recidivism indicators, the Board after 1996 could not give added, and certainly not exclusive, weight to public safety in overruling the

Guidelines.

Id. at 19. Accordingly, the court concluded that prior to 1996, the Board's concern for public safety could not be the "sole or dominant basis" for parole denial while post-1996 considerations of public safety became the "dominant concern" of the Board. Id. at 19-20.

In the instant case, as in Mickens-Thomas, the Board decision denying Petitioner's parole indicated that its action was consistent with "the mandates to protect the safety of the public." In addition, rather than weighing specific factors, the Board simply refused Petitioner's application in February, 1999, January, 2000, and June, 2001 without explanation of how it weighed various factors to reach its decision. Indeed, of these decisions, only in January, 2000, did the Board give any insight into the reasoning behind its decision in its statement that, "Your minimization of your crime and lack of insight after years of sex offender programs causes concern." However, any statement demonstrating this concern was notably absent in previous reviews and in a subsequent review in June, 2001. Otherwise, the notices of the Board simply reiterate that he must receive a favorable recommendation of parole from the Department of Corrections, maintain a clean conduct record and complete the prescriptive program. These are the same requirements as first required of him in 1997. The evidence of record does not contradict Petitioner's assertion that he fulfilled these requirements. Yet, the focus of the Board's action seems to be the underlying offenses rather than the efforts made by Petitioner to address the requirements of the Board.[9]

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[9]This is not to say that the Board may not consider the effectiveness of these programs on the rehabilitation of the Petitioner as it did in January, 2000.

Therefore, it is clear that the concern for public safety was given greater weight in the Board's determinations. Accordingly, as in Mickens-Thomas, the Board's actions in retroactively applying changes in the parole laws to Petitioner violated the ex post facto clause of the United States Constitution.

Although the Petitioner requests release, this court cannot, and should not, usurp the Board's functions and substitute its judgment for that of the Board. Mickens-Thomas, slip op. at 31.[10] Accordingly, I will recommend that this case be remanded to the Board for a new hearing. Under the guidance provided by the Court of Appeals for the Third Circuit, "[i]f the Guidelines recommend release, the Board should fairly consider the weight of this recommendation. A decision contrary to a Guidelines recommendation must be buttressed by unique factors which outweigh the Guidelines endorsement. Moreover, release on parole is a Board policy presumption, and parole should be granted unless countervailing negative factors affirmatively outweigh reasons supporting release." Id. at 31.

CONCLUSION

THEREFORE, this 10th day of March, 2003 it is recommended that Petitioner's Writ for Habeas Corpus be GRANTED to the extent that the case be REMANDED for a further hearing before the Pennsylvania Board of Probation and Parole to be held within forty-five (45) days under the standards that existed prior to the enactment of the amendments to the Probation and Parole Act codified at 61 P.S. 331.1.

In accordance with the Magistrate's Act, 28 U.S.C. §

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[10]In the instant case, there is no evidence that the Board intentionally evaded a court mandate or acted in bad faith.

636 (b) (1) (B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrates, objections to this Report and Recommendation are due by March 26, 2003. Responses and Objections are due by April 7, 2003.

March 10, 2003

/s/
Francis X. Caiazza
Chief U.S. Magistrate Judge

cc:
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID BOWLING, Petitioner	: CIVIL ACTION NO. 01-1400
v.	: Judge McVerry
MR. JOHNSON, PA. BD. OF PROBATION AND PAROLE, Respondents	: Magistrate Judge Caiazza

MEMORANDUM AND ORDER

David Bowling's Petition for Writ of Habeas Corpus was received by the Clerk of Court on July 27, 2001, and was referred to the United States Magistrate Judge Francis X. Caiazza for Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636 (b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation, filed on March 10, 2003, recommended that the Writ of Habeas Corpus filed by David Bowling be granted and that the case be remanded for a further hearing before the Pennsylvania Board of Probation and Parole to be held within forty five days under the standards that existed prior to the enactment of the amendments to the Probation and Parole Act codified at 61 Pa. Cons. Stat. § 331.1. The parties were allowed ten (10) days from the date of service to file objections. Service was made on the Petitioner by First Class United States Mail delivered to the State Correctional Institution at Pittsburgh, Pittsburgh, Pennsylvania, where he is incarcerated and on Respondents.

Objections were filed by the Respondents on March 26, 2003. (Doc. 12) The Petitioner's Response was filed on April 10, 2003. (Doc. 13). In their objections the Respondents seek a stay of this action stating that on March 7, 2003, the Pennsylvania Board of Probation and Parole filed a petition for rehearing before the United States Court of Appeals for the Third Circuit. *See* Resp't's Objections, (Doc. 12) at ¶ 2. However, a review of the General Docket Ledger of the Court of Appeals shows that Appellant's petition for an *en banc* rehearing was denied by order dated March 24, 2003. However, the Ledger shows that on March 31, 2003, the Appellants filed a motion to stay the mandate pending the filing of a Petition for Writ of *Certiorari* in the United States Supreme Court.

After de novo review of the pleadings and documents in the case, together with the Report and Recommendation, objections and Response, the following order is entered:

AND NOW, this 16th day of April, 2003;

IT IS HEREBY ORDERED that Respondents' Motion to Stay Action is GRANTED. The Report of Magistrate Judge Caiazza, dated March 10, 2003, is adopted as the opinion of the court, with the exception of that part of the Recommendation which mandates the Pennsylvania Board of Probation and Parole to schedule a hearing within forty-five days.

/s/
Terrence F. McVerry
United States District Court Judge

cc:
Francis X. Caiazza
Chief U.S. Magistrate judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT BENCHOFF, Petitioner	: CIVIL ACTION NO. 3:CV-03-0740
v.	: (JUDGE CAPUTO)
RAYMOND COLLERAN, et al., Respondents	: (Magistrate Judge Blewitt)

REPORT AND RECOMMENDATION

On May 2, 2003, while incarcerated at the State Correctional Institution at Waymart, Waymart, Pennsylvania, ("SCI-Waymart") the Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is incarcerated as a result of August 15, 1995, convictions in the Franklin County Court of Common Pleas. **(Doc. 1)**. Petitioner also filed an application for leave to proceed *in forma pauperis*. We give the Petition preliminary consideration[1] and conclude that, based on two recent Third Circuit cases, the Petition should be granted to the extent that the Court should enter an Order directing the Pennsylvania Board of Probation and Parole (the Board) to re-adjudicate Petitioner's parole application applying the pre-1996 Pennsylvania Parole Act and rules.

I. State Procedural History

On August 15, 1995, following a jury trial, Petitioner was found guilty of burglary, simple assault, and criminal

[1]See Rule 4, Rules Governing Section 2254 Cases in the United States District Courts.

trespass (Case No. 150-1995). Petitioner plead guilty to two counts of interference with the custody of children (Case No 872-1994).[2] On December 13, 1995, Petitioner received a six to thirty-four (6 to 34) year aggregate sentence of imprisonment. After his sentencing, on December 22, 1995, Petitioner filed an appeal with the trial court. On April 24, 1996, the trial court denied Petitioner's post-sentence motions. On May 1, 1996, Petitioner appealed his sentence and conviction to the Pennsylvania Superior Court. The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence in case number 872-1994 (interference with child custody convictions), but vacated the judgment of sentence in case number 150-1995 (burglary, assault, and trespass convictions). *Commonwealth v. Benchoff*, 700 A.2d 1289 (Pa. Super. 1997).

After re-sentencing by a new Common Pleas Judge, Petitioner then directly appealed both of his judgments of sentence to the Pennsylvania Superior Court (Case # 535 H'burg 1998), 788 A.2d 128 (Pa. Super. May 16, 2001)(Table), and to the Pennsylvania Supreme Court (Case # 386 MAL 2001), *Commonwealth v. Benchoff*, 567 Pa. 735, 788 A.2d 372 (Table)(October 24, 2001). Both courts affirmed his judgments on May 16, 2001, and October 24, 2001, respectively. (Doc. 1, p. 3, ¶ 9.). Petitioner does not state if he filed a Petition for Writ of Certiorari with the United States Supreme Court. Petitioner's judgments of sentence became final thirty (30) days after the Pennsylvania Supreme Court affirmed his judgments of sentence in his case on October 24, 2001, *i.e.*, November 23, 2001. (Id.) See Pa. R.A.P. 1113(a), 42

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[2]Portions of Petitioner's procedure history detailed here have been derived from his Habeas Corpus Petition, Doc. 1 of M.D. Pa. Civil Action No. 3:CV-02-1885, as well as from his 1997 appeal to the Pennsyvlania Superior Court, *Commonwealth v. Benchoff*, 700 A.2d 1289 (Pa. Super. 1997).

Pa. C.S.A. Thereafter, Petitioner states that he filed a federal petition for writ of habeas corpus with this Court, challenging his 1995 convictions, which was docketed at 3:CV-02-0934. (*Id. at* ¶ 11.). Petitioner avers that he then filed a second petition for habeas relief with this Court, challenging the decision of the Board as unconstitutional since the Board did not give him reasons for the denial of parole, which petition was docketed to 3:CV-02-1885. (*Id.*)[3]

Petitioner indicates in his present Habeas Corpus Petition that he did not file a petition under the Post Conviction Relief Act ("PCRA") with the trial court pursuant to 42 Pa. C.S.A. § 9541, *et seq.* (Doc. 1, p.7).

Approximately seven (7) months after his second Habeas Corpus Petition was filed, Petitioner filed the instant Petition for Writ of Habeas Corpus.

Petitioner primarily contends that he is entitled to habeas relief due to the Board's application of amended parole standards which were not in effect at the time he was sentenced and which resulted in the Board's denial of his parole, in violation of the constitutional protection against *ex post facto* laws. In essence, Petitioner claims

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[3]Petitioner's 02-0934 Petition was filed on May 31, 2002, and his 02-1885 Petition was filed on October 15, 2002. Petitioner's 02-0934 Petition was timely filed within one year of the date his judgments became final (November 23, 2001, and May 31, 2002). *See* 28 U.S.C. § 2244(d)(1). *See also Kapral v. United States*, 166 F.3d 565, 570 (3d Cir. 1999)(if a defendant does not file a certiorari petition, a judgment does not become final until the time for seeking certiorari review expires). This Court has not yet ruled on these Petitions. The undersigned is presently preparing a Report and Recommendation regarding Petitioner's habeas corpus petition docketed to Civil Action 02-1885.

that his denial of parole violated the constitution, since the 1996 parole standards were applied retroactively to his 1995 sentences. (*Id., p. 5).* Petitioner's exhibits attached to his Petition seem to indicate that he filed the present claim in a petition for review against the Board with the Pennsylvania Commonwealth Court and then with the Pennsylvania Supreme Court, and that the Commonwealth Court dismissed the petition on November 20, 2002, and the Supreme Court affirmed this decision on April 21, 2003. ___ A.2d __, 2003 WL 1905651). *See* Exhibits A & B attached to Doc. 1.

II. Discussion.

Basically, Petitioner is claiming that he was improperly denied parole by the Board because it applied standards in his case which post-dated his convictions. Petitioner challenges the Board's denial of his parole based on the 1996 amendment to the Pennsylvania Parole Act, which was not in effect at the time of his 1995 convictions. While Respondents have not yet been served with and have not yet responded to the instant Petition, the Exhibits attached to Respondent Colleran's Response to Petitioner's 02-1885 Habeas Corpus Petition show that the Pennsyvlania Parole Board did, in fact, rely upon the amended provision of the Pennsylvania Parol Act in denying Petitioners's last application for parole on October 28, 2002. (*See* Doc. 7, Attachment 5, Civil Action No. 02-1885). Pursuant to the amended provision, Pa. Parole Act. of 1941, as amended, 61 P.s. § 331.1 *et seq.,* the Board specifically considered the interests of the public as one of its reasons to deny Petitioner parole. (*Id.*).

Our review of the State Parole Board decision is limited to an abuse of discretion inquiry, in that relief is only available if an applicant was arbitrarily denied parole on the basis of impermissible criteria such as race, religion, or political beliefs, or on criteria with no rational

relationship to the purpose of parole. *Block v. Potter*, 631 F.2d., 233, 237 (3d Cir. 1980). Petitioner asserts that he was denied parole based on the impermissible retroactive application of the 1996 amendments to his parol application, in violation of the *ex post facto* clause of the Constitution.

Thus, the Petitioner's *ex post facto* claim is that the Pennsylvania Parole Board's decision to deny him parole was based on constitutionally impermissible reasons — namely, that the Board impermissibly applied to his parole application parole standards amended in 1996, which were not in effect at the time of his sentencing (1995). Petitioner thus claims that the decision rendered by the Pennsylvania Parole Board violate his constitutional right prohibiting *ex post facto* laws.

It is well-settled that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). Furthermore, it has been held that the Pennsylvania parol statute does not create a liberty interest in the right to be paroled. *Rodgers v. Parole Agent SCI-Frackville, Wech*, 916 F. Supp. 474, 476-77 (E.D. Pa. 1996); *McCrery v. Mark*, 823 F. Sup. 288, 294 (E.D. Pa. 1993). However, the United States Court of Appeals for the Third Circuit has also held that "[E]ven if a state statute does not give rise to a liberty interest in parole release under *Greenholtz*, once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process clause in not being denied parole for arbitrary or constitutionally impermissible reasons." *Block v. Potter*, 631 F.2d at 236 (Emphasis added). Accordingly, even where a state statute grants discretion to the state parole board to condition or completely deny parole, it may not permit "totally

arbitrary parole decisions founded on impermissible criteria." *Id.* Consequently, a federal court may review a decision by a state parole board for an abuse of discretion. *Id.* Upon such review, relief will only be available if an applicant can show that parole was arbitrarily denied based on some impermissible reason such as "race, religion, or political beliefs," or that the parole board made its determination based on "frivolous criteria with no rational relationship to the purpose of parole...." *Id.* at 236 n.2. Petitioner claims that the Board's decision in his case was based upon the constitutionally impermissible retroactive application of new parole amendments to his case.

As previously noted, it has been repeatedly recognized that Pennsylvania State Law does not confer its inmates with a legally protected interest in parole eligibility. However, in two recent cases similar to Petitioner's, the Third Circuit has held that the Pennsylvania 1996 statutory change to the Parole Act, which expressed "for the first time that 'the board shall first and foremost seek to protect the safety of the public,'" violates the *ex post facto* clause when applied to prisoners convicted prior to the amendment. *Hollawell v. Gillis*, 2003 WL 1919371 (3d Cir. 2003) at p. 5; *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003).[4] The Third Circuit recognized that a parole decision is subject to collateral attack on constitutional grounds such as the *ex post facto* clause. *Id.* This is precisely Petitioner's claim in our case. The Third Circuit applied the test annunciated by the United States Supreme Court in *Cal. Dept. of Corr. v. Morales*, 514 U.S. 499, 509 (1995), in determining that the Pennsylvania 1996 parole law amendment violated the *ex*

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[4]In *Hollawell*, the Third Circuit stated that "*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto Clause*." *Hollawell* at p. 6.

post facto clause if it was applied to pre-1996 prisoners. *Id.* Specifically, the *Mickens-Thomas* Court "held that Pennsylvania's change to the parole statute altered the manner in which the Parole board weighed public safety in making parole decisions... ." *Id.* at p. 6. In *Mickens-Thomas,* the Third Circuit held that the 1996 amendments changed the substantive criteria for parol release in Pennsylvania. *Mickens-Thomas,* 321 F.3d at 392.[5] In both *Mickens-Thomas* and *Hollawell,* the Third Circuit directed that the District Court remand the Petitioners' parole applications to the Pennsylvania Parole Board for re-adjudication applying the pre-1996 law.

Furthermore, it is of no moment that the Pennsylvania Courts have held that the denial of our Petitioner's parole was not based on constitutionally impermissible reasons. The Pennsylvania Commonwealth Court stated in its November 20, 2002, Order dismissing Petitioner's petition for review that the amended statement of Policy of the Pennsylvania Parole Act "does not create any substantive rights... ." (Doc. 1, Exhibit B). The Pennsylvania Supreme Court affirmed. (*Id.* at Exhibit A). Moreover, the Pennsylvania Supreme Court in *Winklespecht v. Pa. Bd. of Prob. & Parole* , 813 A.d 688, 692 (Pa. 2002), held that the 1996 amendment did not change Pennsylvania policy as to the criteria for parole, and it did no create a new

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[5]We note that, unlike the Petitioner in *Hollawell,* who did not appeal his Commonwealth Court decision to the Pennsylvania Supreme Court, our Petitioner did. (Doc. 1, Exhibit A). In any event, the Third Circuit still held that *Hollawell* satisfied the exhaustion requirement. *Hollawell* at p. 4. In fact, our Petitioner filed the instant Petition within one (1) month after the Pennsyvlania Supreme Court affirmed the dismissal of his petition for review by the Pennsylvania Commonwealth Court, in which he challenged the Board's decision. (April 21, 2003, to May 2, 2003).

offense or increase the penalty for an existing offense.[6]

Notwithstanding these decisions of the Pennsylvania Courts, which found that the 1996 amendment did not enact a substantive change in Parole Board policy, the Third Circuit noted that *Mickens-Thomas*, is binding precedent on it. *Hollawell* at p. 6. Likewise, this Court is constrained to follow *Mickens-Thomas,* and in doing so we find that this Court should direct the Pennsylvania Parole Board to reconsider Petitioner's parole application and its October 28, 2002, decision under pre-1996 law and rules. Thus, even though the Petition in this case has not yet been served on Respondents, we make the unusual recommendation that the Court grant the Petition to the extent stated in light of clear guidance on the issue presented in this matter from the Third Circuit.[7]

As stated, Petitioner maintains that the Parole Board should not have utilized the 1996 amended parol standards in his case as a basis to deny him parole. Petitioner's challenge of the Parole Board's decision is based on a constitutionally recognized reason, according to *Mickens-Thomas* and *Hollawell.* Therefore, it will be

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[6]Interestingly, the Pennsylvania Commonwealth Court in *Voss v. Pennsylvania Bd. Prob. and Parole,* 788 A.2d 1107, 1111 (Pa. Cmwlth. 2001), stated that under the 1996 amendment, the Board is required "to seek first and foremost to protect the safety of the public." The *Voss* Court further stated that "the public policy as to parole changed in 1996 from client-centered policy emphasizing rehabilitation to one that emphasizes public safety... ." Id.

[7]Since the Petition has not yet been served on Respondents, we shall direct the Clerk of Court to serve them with a copy of the Petition, along with a copy of this Report and Recommendation, and to serve these documents on Respondent Colleran's counsel in case Number 02-1885.

recommended that his Petition be granted to the extent that the Court enter an Order directing the Pennsylvania Parole Board to re-adjudicate Petitioner's parol application and its October 28, 2002, decision, by applying the pre-1996 law and rules.

III. Recommendation.

Based on the forgoing, it is respectfully recommended that the Petition for Writ of Habeas Corpus be granted to the extent that the Court enter an Order directing the Pennsylvania Parole Board to re-adjudicate Petitioner's parole application and its October 28, 2002, decision, by applying the pre-1996 law and rules.

/s/
THOMAS M. BLEWITT
United States Magistrate Judge

Dated: May 16, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT BENCHOFF, Petitioner	: CIVIL ACTION NO. 3:CV-03-0740
v.	: (JUDGE CAPUTO)
RAYMOND COLLERAN, et al., Respondents	: (Magistrate Judge Blewitt)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated **May 16, 2003.**

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or

modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

/s/
THOMAS M. BLEWITT
United States Magistrate Judge

Date: May 16, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT BENCHOFF, Petitioner	: CIVIL ACTION NO. 3:CV-03-0740
v.	: (JUDGE CAPUTO)
RAYMOND COLLERAN, et al., Respondents	: (Magistrate Judge Blewitt)

ORDER

NOW, this 6th day of June 2003, upon review of Magistrate Judge Thomas M. Blewitt's May 16, 2003 report and recommendation (Doc. 3) for plain error or manifest injustice, **IT IS HEREBY ORDERED** that:

7. The report and recommendation is **ADOPTED.**

8. In light of *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), Petitioner's petition for writ of habeas corpus is **GRANTED.**

9. The Pennsylvania Parole Board shall re-adjudicate Petitioner's parole application, which was denied on October 28, 2002, under the law and rules that were in effect prior to the 1996 amendments to the Pennsylvania Parole Act.

/s/
A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM F. MOORE, Petitioner	:	
vs.	:	CIVIL NO. 3: CV-: 00-0090
WILLIAM F. WARD, et al., Respondents	:	(Judge Conaboy)

MEMORANDUM AND ORDER
Background

William F. Moore, an inmate confined at the Rockview State Correctional Institution (SCI - Rockview), initiated this pro se action by filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By Order dated February 1, 2000, this Court construed the above action as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, granted Moore temporary leave to proceed in forma pauperis, and dismissed his petition without prejudice for failure to demonstrate exhaustion of his available state court remedies.

On December 20, 2001, the United States Court of Appeals for the Third Circuit issued an Order wherein it agreed that this matter was properly construed as a habeas action and concluded that Petitioner had exhausted his available state court remedies under Coady v. Vaughn, 251 F. 3d 480 (3d Cir. 2001).[1] The Order further directed that Moore's July 20, 2001 response be

[1]It is noted that the decision in Coady was announced over a year after this Court's February 1, 2000 entry of dismissal.

construed as an amendment to his petition and remanded the case for consideration of the Petitioner's Ex Post Facto claim on the merits. Following a lengthy delay, the record was returned to this Court at which time service of the petition and amendment were ordered.

After being granted an enlargement of time, the Respondent submitted a response to the petition on November 4, 2002. Petitioner then sought and was granted an enlargement of time to file a reply. He thereafter filed a timely reply. This matter is now ripe for consideration.

Named as Respondents are William F. Ward, Chairman of the Pennsylvania Board of Probation and Parole (Parole Board) and eight (8) other Board members. It is undisputed that the Petitioner was arrested for a technical parole violation on August 6, 1994. The original petition contended that following a parole violation hearing on September 15, 1994, Moore was informed that he would be reincarcerated for six (6) to nine (9) months as a result of his parole violation. He alleged that said determination was both retaliatory and a violation of due process because it:

> "retroactively rescinding its order of re-parole and exceeding (sic) the presumptive range for back time without giving plaintiff (a technical parole violator) and adequate written justification for doing so and without conducting a hearing."

Doc. 1, ¶ 18.

Moore's July 20, 2001 submission, which has been deemed an amendment to his petition, states that he was tentatively granted reparole subject to approval of his home plan. He notes that the Parole Board's rules and procedures "have been systematically changed." Doc. 24,

p. 5. Furthermore, he "was penalized when he was retroactively placed under new guidelines." Id. at p. 4.

As earlier noted, the Third Circuit has determined that the Petitioner's amendment asserts the Parole Board's recission of reparole and denial of reparole decisions violated the Ex Post Facto Clause.

Discussion

The Respondents initially contend that the claims "raised in the Original Complaint were not properly raised in a petition for a writ of habeas corpus and, therefore, the Original Complaint should be dismissed. See Doc. 32, ¶ 17. As noted above, this Court's February 1, 2000 Order construed Moore's original complaint as a § 2254 habeas petition. By Order dated December 20, 2001, the Third Circuit agreed that "appellant's civil rights complaint was properly construed as a habeas petition pursuant to 28 U.S.C. § 2254." Doc. 21, p. 1.

Based on the prior determinations rendered by both this Court and the Third Circuit, the Respondents' initial argument for dismissal is baseless.

Respondents next contend that dismissal of the petition is warranted because Moore "has not alleged that he exhausted all available state remedies in relation to his ex post facto claim." Doc. 32, ¶ 23. In Coady, the Court of Appeals for the Third Circuit addressed a claim by a state prisoner who alleged that changes in criteria undertaken by the Pennsylvania Board of Probation and Parole violated the Ex Post Facto clause. It held in part that an applicant asserting such a claim had an available state court remedy which must be exhausted prior to seeking habeas relief in federal court. See Coady, 251 F. 3d. at P. 489.

The Third Circuit's December 20, 2001 Order found that Moore "has exhausted his state remedies under Coady." Doc. 21, p. 1. Since this Court is bound by that determination, the Respondents' argument for dismissal based on non-exhaustion of state court remedies is unpersuasive.

In December 1996, the Pennsylvania state legislature amended the law governing parole. Under the modified criteria, protection of the safety of the public is the paramount condition which must be considered in determining parole eligibility. A new law or policy violates the Ex Post Facto clause of the United States Constitution when it is applied to events which occurred prior to its enactment and disadvantages the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981).

Recently, in Mickens - Thomas v. Vaughn, 321 F. 3d 374 (3d Cir. 2003), the Third Circuit addressed a habeas petition by a Pennsylvania state inmate whose life sentence had been commuted to a term of years with parole eligibility. The applicant claimed entitlement under the Ex Post Facto clause to have the Parole Board determine his parole eligibility based on parole criteria which existed at the time of his conviction and commutation. The Court of Appeals concluded that the 1996 Parole Board policy, even though partly discretionary, was subject to ex post facto analysis because there were "sufficiently discernible criteria to suggest to a reviewing body that the new retroactive policies are being applied against the offender's interest." Id. at p. 386. In conclusion, the matter was remanded to the Parole Board with instructions to fairly consider Mickens-Thomas's parole application in accordance with its decision that "to retroactively apply changes in the parole laws made after conviction" violated the Ex Post Facto clause. Id. at 393.

Respondents' remaining argument is that the new parole criteria did not go into effect until December 18, 1996. Thus, it was not yet in place when the Parole Board rescinded reparole to Moore in December, 1995 and May, 1996. Consequently, Petitioner has failed to meet his burden of showing an Ex Post Facto violation.

It is undisputed that the Pennsylvania legislature did not amend the law governing parole until December, 1996. However, in Mickens - Thomas, the Third Circuit noted that in early 1996 a Pennsylvania Senate committee "strongly recommended" that the Parole Board "place added emphasis on community safety." Id. at 377. The Third Circuit also noted that a mid-1995 assessment by the Pennsylvania Inspector General decided that more emphasis on public safety was needed in making parole decisions. Id. at 380. Additionally, a February, 1996 report by the Chairman of the Pennsylvania Senate Judiciary Committee noted that the Parole Board had recently set out to establish public safety as a priority, including a more careful review of parole eligible cases. Id.

Respondents generally contend only that the new statute was not in place at the time of the denials of Moore's reparole. They have not however, stated whether new parole policies were retroactively applied in the Petitioner's May 1996 review. Based on an application of the facts and reasoning set forth in Mickens - Thomas, it appears that the Parole Board's May, 1996 denial of reparole may have been based on a retroactive application of newly developed parole criteria in violation of the Ex Post Facto clause.

It is the conclusion of this Court that the interests of justice may best be served by remanding this matter to the Parole Board with instructions that it provide Moore with a new reparole hearing in accordance with the

criteria established by the Third Circuit in Mickens - Thomas. An appropriate Order will enter.

AND NOW, THEREFORE, THIS 10th DAY OF JULY, 2003, IT IS HEREBY ORDERED THAT:

1. The petition for writ of habeas corpus is granted.

2. This matter is remanded to the Pennsylvania Board of Probation and Parole. Within thirty (30) days of the date of this Order, the Petitioner will be afforded a new reparole hearing in accordance with the standards announced in Mickens - Thomas v. Vaughn, 321 F. 3d 374 (3d Cir. 2003).

3. The clerk of Court is directed to close the case.

/s/
RICHARD P. CONABOY
United States District Judge

(5)

Supreme Court, U.S.
FILED
SEP 23 2003
OFFICE OF THE CLERK

No. 03-47

In the Supreme Court of the United States

FRANK D. GILLIS, ET AL.,
Petitioners

v.

JOHN HOLLWELL, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF

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APPENDIX:

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ARGUMENT

The purpose of this supplemental brief is to bring to the Court's attention the decision of the Court of Appeals in *McLaurin v. Larkins*, No. 00-3407 (3d Cir., September 18, 2003).[1] *McLaurin* is yet another ex post facto parole case in which the Court of Appeals, following its decision in *Mickens-Thomas*, ordered the District Court "at a minimum," to issue a conditional writ of habeas corpus requiring the Parole Board to conduct a new parole hearing using the Court of Appeals' pre-1996 standards announced by the Court of Appeals in *Mickens-Thomas*. This decision provides further evidence, if any were needed, that the decision in *Mickens-Thomas* has not been confined to its facts, as respondents argued it would be, but rather continues to have a broad and destructive impact upon Pennsylvania's parole system.

Respectfully submitted,

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September 23, 2003

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[1] *McLaurin* is unreported and is reprinted in the appendix to this brief.

APPENDIX

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

NO. 00-3407

STEVEN McLAURIN,

Appellant

v.

DAVID LARKINS,

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 00-cv-00177E)
District Judge: Hon. Sean J. McLaughlin

Submitted Under Third Circuit LAR 34.1(a)
September 2, 2003

Before: SLOVITER, NYGAARD and ROTH,
Circuit Judges

(Filed: September 18, 2003)

OPINION OF THE COURT

SLOVITER, Circuit Judge.

I.

Appellant Steven McLaurin appeals to this court from the order of the District Court dismissing his 28 U.S.C. § 2254 petition for habeas corpus relief and denying his requested certificate of appealability. Because the District Court did not have the benefit of our recent decision in Mickens-Thomas v. Vaughn, 321 F.3d 374 (3d Cir. 2003), we will remand to the District Court to consider McLaurin's ex post facto claims in light of Mickens-Thomas.

II.

Inasmuch as the parties are familiar with the factual and procedural background of this case, we refer only to those facts as are pertinent to the issue under consideration. McLaurin is currently serving a twelve and a half to twenty five year prison sentence for robbery and criminal conspiracy to commit robbery. His minimum date of incarceration expired on December 30, 1995, whereas his maximum date of incarceration will end on June 30, 2008. McLaurin was last interviewed for parole on July 15, 1998. The Pennsylvania Board of Probation and Parole ("Board") denied parole at that time.

Following this denial of parole, McLaurin sought declaratory relief in the Pennsylvania Commonwealth Court, which dismissed his claims. After unsuccessfully filing a petition for allowance of appeal in the Pennsylvania Supreme Court, McLaurin filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Pennsylvania on May 24, 1999. His petition was referred to a Magistrate Judge who issued a report and recommendation, which the District Court adopted as its own opinion on March 22, 2000.[1] The District Court rejected McLaurin's ex post

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[1]Because the District Court adopted the Magistrate Judge's report and recommendation, we will refer to the (continued...)

facto claims and denied a certificate of appealability because McLaurin "has not made a substantial showing of the denial of a constitutional right." Exhibit C at 34 (Br. of Appellant). McLaurin appealed to this court.

III.

The District Court denied McLaurin's ex post facto claims long before our decision in Mickens-Thomas, where we held that the retroactive application of the 1996 amendment to Pennsylvania's Parole Act's statement of public policy violated the Ex Post Facto Clause. 321 F.3d at 393. To be exact, we held that "to retroactively apply changes in the parole laws made after conviction for a life sentence in Pennsylvania that adversely affect the release of prisoners whose sentences have been commuted, violates the Ex Post Facto clause." Id.

Admittedly, the holding of Mickens-Thomas does not directly control every issue in the case before us as McLaurin, unlike Mickens-Thomas, is not serving a life sentence that has been commuted. Also, Mickens-Thomas challenged only the Parole Act's public policy statement whereas McLaurin challenges that statement, in addition to various other parole requirements. Specifically, McLaurin challenges the requirement that there must be an affirmative agreement of three reviewers to grant parole to "violent offenders," the requirement for the Board's Chairman to certify as a prerequisite to parole eligibility that a parole applicant has complied with all statutory requirements including a requirement that a "violent offender" has served at least one year in a prerelease center,[2] and the requirement that the Board

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[1](...continued)
adopted opinion as that of the District Court.

[2]In its brief, the Commonwealth states that that section was not applied to McLaurin's application and notes that the (continued...)

consider and determine whether the parole applicant has served the minimum sentence recommended by the Pennsylvania Sentencing Guidelines. Br. of Appellant at 14-15. Notwithstanding that McLaurin's ex post facto challenges are broader than that at issue in Mickens-Thomas, our thorough ex post facto analysis in Mickens-Thomas is highly instructive and we believe the District Court may have treated McLaurin's petition differently if it had had the benefit of that decision. Thus, we remand McLaurin's case to the District Court to reconsider its ex post facto claims in light of Mickens-Thomas.

It should be noted that in Mickens-Thomas, we remanded the case to the District Court to order the Board to conduct a new hearing for Mickens-Thomas applying the pre-1996 statute. 321 F.3d at 393; see also Hollawell v. Gillis, 2003 U.S. App. LEXIS 7718 (3d Cir. 2003) (in light of Mickens-Thomas, remanding to the district court to order Board to conduct new hearing for prisoner with pre-1996 statute).[3] At minimum, on remand, the District Court should do the same.

For the reasons set forth above, we will vacate the order of the District Court and remand for its consideration as set forth above.

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[2](...continued)
Board of Probation and Parole conceded in Myers v. Ridge, 712 A.2d 791 (Pa. Cmwlth. 1998), that it could not constitutionally apply the amended statute to a prisoner who committed his crime before the date of the amendment.

[3]Pennsylvania's Attorney General has recently filed a Petition for Certiorari to the United States Supreme Court in both Mickens-Thomas and Hollawell. Thus, the District Court may choose to stay this matter on remand pending the Supreme Court's decision on that Petition.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter
Circuit Judge